No. 14-1055

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CRYSTAL LIGHTFOOT
AND BEVERLY HOLLIS-ARRINGTON,

Petitioners,

v.

CENDANT MORTGAGE CORP. D/B/A PHH MORTGAGE, FANNIE MAE, ROBERT O. MATTHEWS AND ATTORNEYS EQUITY NATIONAL CORP.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The congressional charter of the Federal National Mortgage Association ("Fannie Mae") grants it the power "to sue and to be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal." 12 U.S.C. § 1723a(a).

The questions presented are:

(1) whether the phrase "to sue and be sued, and to complain and to defend, **in any court of competent jurisdiction**, State or Federal" in Fannie Mae's charter confers original jurisdiction over every case brought by or against Fannie Mae to the federal courts; and

(2) whether the majority's decision in *Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247 (1992) (5-4 decision), should be reversed.

PARTIES TO THE PROCEEDING

Petitioners, who were Plaintiffs-Appellants below, are Crystal Lightfoot and Beverly Hollis-Arrington.

Respondents, who were Defendant-Appellees below, are Cendant Mortgage Corporation, doing business as PHH Mortgage; Fannie Mae; Robert O. Matthews; and Attorneys Equity National Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Crystal Lightfoot and Beverly Hollis-Arrington submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Court of Appeals for the Ninth Circuit affirmed the district court's denial of Petitioners' motion to remand to state court and dismissal of Petitioners' claims in an opinion reported at *Lightfoot v. Cendant Mortgage Corp.*, 769 F.3d 681 (9th Cir. 2014). The United States District Court decision denying Petitioners' motion to remand to state court is unreported. (Pet'r App. D at 43a-44a.)

JURISDICTION

The Court of Appeals for the Ninth Circuit entered judgment on October 2, 2014. (Pet'r App. B at 3a-40a.) That day Petitioners filed a timely petition for rehearing *en banc*. The Court of Appeals for the Ninth Circuit denied Petitioners' petition for rehearing *en banc* on November 20, 2014. (Pet'r App. 1a-2a) This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The appendix reproduces selected provisions from Federal National Mortgage Association Charter Act, as amended, 12 U.S.C. § 1716 *et seq.* Specifically, the appendix contains 12 U.S.C. § 1717(a) and 12 U.S.C. § 1723a(a) in their entirety. (Pet'r App. F, G.) The portion of 12 U.S.C. § 1717(a) that is most relevant to this matter is as follows:

> On September 1, 1968, the body corporate described in the foregoing paragraph shall cease to exist in that form and is hereby partitioned into two separate and distinct bodies corporate, each of which shall have continuity and corporate succession as a separated portion of the previously existing body corporate, as follows:
>
> One of such separated portions shall be a body corporate without capital stock to be known as Government National Mortgage Association (hereinafter referred to as the "Association"), which shall be in the Department of Housing and Urban Development...
>
> The other such separated portion shall be a body corporate to be known as Federal National Mortgage Association (hereinafter referred to as the "corporation")...The corporation shall have succession until dissolved by Act of Congress. It shall maintain its principal office in the District of Columbia or the metropolitan area thereof and shall be deemed, for purposes of jurisdiction and venue in civil actions, to be a District of Columbia corporation.

12 U.S.C. § 1717(a)(2)(A)-(B).

The portion of 12 U.S.C. § 1723a(a) that is most relevant to this matter is as follows:

> Each of the bodies corporate named in section 1717(a)(2) of this title shall have power to...sue

> and to be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal, but no attachment, injunction, or other similar process, mesne or final, shall be issued against the property of the Association or against the Association with respect to its property...

12 U.S.C. § 1723a(a).

STATEMENT OF THE CASE

In 2002, Appellants filed suit against Appellees in California state court. There is no dispute that Appellants' underlying claims are all state law claims stemming from a real property foreclosure matter. Appellee Fannie Mae, thereafter, removed the matter to the United States District Court for the Central District of California. (Pet'r App. E at 45a-49a.) All other Appellees concurrently joined in Fannie Mae's removal of the action. Fannie Mae's sole basis of removal was under a belief that its congressionally created charter, 12 U.S.C. § 1723a, conferred automatic federal jurisdiction. (Pet'r App. E at 47a.) That statute says Fannie Mae has authority "to sue and be sued, and to complain and defend, *in any court of competent jurisdiction*, State or Federal." 12 U.S.C. § 1723a(a) (emphasis added). Fannie Mae cited this Court's decision in *Am. Nat'l Red Cross v. S.G. & A.E.* ("*Red Cross*"), 505 U.S. 247 (1992), in support of its position that the "sue and be sued" provision in its federal charter confers original and automatic federal jurisdiction over all cases to which Fannie Mae is a party.

After removal, Appellants immediately sought a remand in district court arguing Fannie Mae's charter did not confer automatic federal question jurisdiction. The district court denied Appellants' application to remand on September 5, 2002. (Pet'r App. D at 43a-44a.) The matter lingered in U.S. District Court for the Central District of California for many years. Final judgment was entered pursuant to Fed. R. Civ. Pro. 58, by the district court judge on June 11, 2010. Appellants timely filed a notice of appeal on July 6, 2010, within 30 days of entry of final judgment.

On January 9, 2012, the United States Court of Appeal for the Ninth Circuit issued a decision affirming the District Court's denial of Appellants' motion to remand on the basis that the District Court had removal jurisdiction over state claims filed to circumvent the res judicata impact of a federal judgment. Notably, however, Fannie Mae did not remove the case on that basis. On April 13, 2012, the Ninth Circuit, *sua sponte*, withdrew its memorandum disposition and ordered the parties to submit briefing on the issue of whether the district court had subject matter jurisdiction on the basis of Fannie Mae's federal charter.

On October 2, 2014, the Ninth Circuit held that Fannie Mae's federal charter conferred original jurisdiction in the federal courts, applying the rule this Court articulated in *Red Cross*—*i.e.*, that "a congressional charter's 'sue and be sued' provision may be read to confer federal court jurisdiction if, but only if, it specifically mentions the federal courts." (Pet'r App. B at 3a-40a.)

REASONS FOR GRANTING THE PETITION

The courts of appeal are divided on the frequently reoccurring question of whether a congressional charter permitting a governmental entity to "sue and be sued... in any court of competent jurisdiction, State or Federal" confers original jurisdiction over such suits with the federal courts. Relying on this Court's decision in *Red Cross*, the Ninth Circuit, in its decision below, and the D.C. Circuit have held that this provision confers original jurisdiction. On the other hand, the Second, Third, Fifth, and Seventh Circuits have held that this language does not confer original jurisdiction. District courts have frequently grappled with this issue, but continue to reach opposite conclusions. Thus, while some cases proceed in federal court, others are remanded to state court, where the rules of civil procedure are often more favorable to the plaintiff. This Court's interpretation of Fannie Mae's congressional charter is of significant importance because the congressional charters of other governmental entities have the same or substantially similar language to that of Fannie Mae's. Petitioners request that this Court grant this petition for a writ of certiorari to review this "important question of federal law that has not been, but should be settled by this Court." *See* U.S. S. Ct. R. 10(a), (c).

I. Certiorari Should Be Granted Because Federal Courts are Fractured on the Question of Original Subject Matter Jurisdiction for Cases in which Fannie Mae is a Party.

A. The Ninth Circuit's Decision is Inconsistent with United States Supreme Court Precedent.

In its decision below, the Ninth Circuit held that Fannie Mae's congressional charter, permitting Fannie Mae to "sue and be sued...in any court of competent jurisdiction, State or Federal," confers original jurisdiction in the federal courts. *See Lightfoot*, 769 F.3d at 690. The Ninth Circuit applied this Court's holding in *Red Cross*, which was that "a congressional charter's 'sue and be sued' provision may be read to confer federal court jurisdiction if, but only if, it specifically mentions the federal courts." *Id.* at 684. However, the Ninth Circuit's decision is inconsistent with this Court's precedent.

As an initial matter, the Ninth Circuit's decision is inconsistent with this Court's determination that Congress intended the language at issue to waive governmental immunity from suit, not to confer jurisdiction. For example, in *Keifer & Keifer*, this Court analyzed the congressional charter of the Reconstruction Finance Corporation, which granted the authority to "sue and be used, to complain and to defend, in any court of competent jurisdiction, State or Federal," *see Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 392-96 (1939)—the *exact* language at issue in Fannie Mae's congressional charter, *see* 12 U.S.C. § 1723a(a). This Court noted that, at that time, Congress had provided for no less than forty corporations that discharged governmental functions, all

of which contained the authority to "sue and be sued." *See Keifer & Keifer*, 306 U.S. at 390 & n.3. This Court held that the language at issue reflected Congress's intent to waive governmental immunity from suit; it did not hold that the language also conferred jurisdiction. *Id.* at 392-96. Accordingly, when Congress permits an entity to "sue and be sued...in any court of competent jurisdiction, State or Federal," such a provision is intended to waive governmental immunity. *See also Fed. Hous. Admin. v. Burr*, 309 U.S. 242 (1940) (holding that the provision "sue and be sued in any court of competent jurisdiction, State or Federal" was a waiver of governmental immunity that should be liberally construed, allowing the Federal Housing Administration to be sued for garnishment for moneys due to an employee under state law).

The Ninth Circuit's rationale is also inconsistent with this Court's decision in *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900). In *Shoshone Mining*, this Court revisited the question of whether "a suit brought in support of an adverse claim under §§ 2325 and 2326 of the Revised Statutes was not a suit arising under the laws of the United States in such a sense as to confer jurisdiction on a Federal court regardless of the citizenship of the parties." 177 U.S. at 505. In the relevant statutes, Congress authorized a litigant to proceed "in a court of competent jurisdiction." *Id.* at 506. This Court held that this provision did not, by itself, confer original jurisdiction in the federal courts; instead, the federal courts could only exercise jurisdiction over such a suit if there was an independent basis for federal jurisdiction. *Id.* at 506-7. The Court explained as follows:

> [Congress] did not in express language prescribe either a Federal or a state court, and did not provide for exclusive or concurrent jurisdiction. If it had intended that the jurisdiction should be vested only in the Federal courts, it would undoubtedly have said so. *If it had intended that any new rule of demarcation between the jurisdiction of the Federal and state courts should apply, it would likewise undoubtedly have said so. Leaving the matter as it did, it unquestionably meant that the competency of the court should be determined by rules theretofore prescribed in respect to the jurisdiction of the Federal courts...* [I]t would be true that if the amount in controversy was not in excess of $2,000, or if the parties were not citizens of different states, and the suit was not one arising under the Constitution or laws of the United States, the Federal courts could not take jurisdiction.

Id. (emphasis added). Pursuant to *Shoshone Mining Co.*, when Congress intends any new "rule of demarcation" between the jurisdiction of the federal and state courts, Congress must so state. Otherwise, federal courts must have an independent basis for jurisdiction—*i.e.*, diversity of citizenship or federal question jurisdiction.

The only distinction between Fannie Mae's congressional charter and the provision at issue in *Shoshone Mining Co.* is the inclusion of the phrase "State or Federal." *Compare Shoshone Mining Co.*, 177 U.S. at 506, *with* 12 U.S.C. § 1723a(a). Fannie Mae's congressional charter allows for suit "in any court of competent

jurisdiction, *State or Federal*." 12 U.S.C. § 1723a(a). Here, just as this Court in *Shoshone Mining Co.* held that the phrase "in any court of competent jurisdiction" did not require a new "rule of demarcation" between the jurisdiction of the federal and state courts, neither does the addition of the phrase "State and Federal." On its face, Fannie Mae's congressional charter treats state and federal courts equally in that the phrase "in any court of competent jurisdiction" modifies both "State" and "Federal." Thus, under the rationale of *Shoshone Mining Co.*, state and federal courts must have an independent source of jurisdiction. The Ninth Circuit's decision that including the phrase "State or Federal" confers original jurisdiction with the federal courts is inconsistent with this Court's holding in *Shoshone Mining Co.*

In its decision below, the Ninth Circuit found that Congress must have intended the inclusion of the phrase "State or Federal" to confer original jurisdiction with the federal courts. *See Lightfoot*, 769 F.3d at 685-86. However, the Ninth Circuit's rationale ignores the likelihood that Congress retained the phrase "State or Federal" out of concern that the congressional charter might be read to limit jurisdiction to either the federal courts or the state courts in light of this Court's decisions in cases such as *State of Minnesota v. United States*, 305 U.S. 382 (1939), and *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573 (1946). *Cf. Red Cross*, 505 U.S. at 275 (Scalia, J., dissenting) ("The addition of the words 'State or Federal' eliminates the possibility that the language 'courts of law and equity within the jurisdiction of the United States' that was contained in the original charter... might be read to limit the grant of capacity to sue in federal court.").

In *State of Minnesota*, the State brought suit in state court to take, pursuant to state law, nine allotted parcels of land, some of which belonged to the Grand Portage Indian Reservation, which was formed under federal law. 305 U.S. at 383. In determining whether the state court had jurisdiction to hear the case, the Court explained that "Congress has provided generally for suits against the United States in *federal courts*. And it rests with Congress to determine not only whether the United States may be sued, but in what courts the suit may be brought." *Id.* at 388 (emphasis added). This Court held that, because Congress did not specifically state that such a suit could be brought in state court, the state court did not have jurisdiction to hear the case. *Id.* at 388-89.

Seven years later, in *Kennecott Copper*, this Court analyzed a state statute that permitted taxpayers who wished to challenge a decision of the tax commission or to recover any taxes deemed unlawful to "bring an action in any court of competent jurisdiction," without reference to *either* state or federal courts. 327 U.S. at 574-575, 575 n.1. Federal jurisdiction was claimed under diversity of citizenship and because the controversy arose under the Constitution and the laws of the United States. *Id.* at 576. This Court rejected petitioners' argument that "any court of competent jurisdiction" should be construed to grant jurisdiction to both state and federal courts, and reiterated its rule that "clear declaration of a state's consent to suit against itself in the federal courts on fiscal claims is required." *Id.* at 577-78. Accordingly, because the statute did not specifically state that suit could be brought in federal court, this Court held that the federal courts did not have jurisdiction. *Id.* at 579-80.

Read together, *State of Minnesota* and *Kennecott Copper* could be interpreted to mean that, in order for Congress to ensure that a litigant is able to bring a case in either state or federal court, it *must* include the phrase "in any court of competent jurisdiction, *State or Federal*." Because the Ninth Circuit's decision is inconsistent with this Court's precedent, Petitioners request that this Court grant this petition to resolve this issue.

B. This Court Has Never Directly Addressed Whether Fannie Mae's Congressional Charter Confers Original Jurisdiction with the Federal Courts.

This Court has been repeatedly called upon to determine whether the "sue and be sued" provision in various congressional charters confer original jurisdiction with the federal courts. However, this Court has never analyzed whether Fannie Mae's congressional charter—which states that Fannie Mae may "sue and to be sued... in any court of competent jurisdiction, State or Federal," 12 U.S.C. § 1723a(a)—or any other charter with substantially similar language confers original jurisdiction in the federal courts to every case in which Fannie Mae (or other governmental entity) is a party. Thus, Petitioners request that this Court grant their petition for a writ of certiorari to resolve this issue and create uniformity in the application of the law.

This Court analyzed the first Bank's congressional charter in *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809), *rev'd on other grounds*, *Louisville, C. & C.R. Co. v. Letson*, 43 U.S. (1 How.) 497, 555-56 (1844). This Court held that the Bank's charter, which stated

that the Bank was "made able and capable in law...to sue and be sued...in courts of records, or any other place whatsoever," did not confer jurisdiction on the federal courts to adjudicate suits brought by the Bank. Instead, this Court held that the provision "is not understood to enlarge the jurisdiction of any particular court, but to give a capacity to the corporation to appear, as a corporation, in any court which would, by law, have cognizance of the cause, if brought by individuals. *If jurisdiction is given by this clause to the Federal courts, it is equally given to all courts having original jurisdiction, and for all sums, however small they may be.*" *Id.* at 85-86 (emphasis added).

Fifteen years later, this Court analyzed the second Bank's congressional charter, which stated that the Bank was "made able and capable, in law...to sue and be sued... in all state courts having competent jurisdiction, and in any Circuit Court of the United States." *Osborn v. Bank of the United States*, 22 U.S. (1 Wheat.) 738 (1824). In *Osborn*, this Court held that the congressional charter conferred jurisdiction on federal circuit courts because, in contrast with the first Bank's charter which granted the power to sue and be sued in all courts generally, the second Bank's charter granted the power to sue and be sued in *particular* federal courts (*i.e.*, Circuit Courts of Appeal), indicating Congress's intent to grant original jurisdiction to Circuit Courts of Appeal. *Id.* at 818-19.

In *Bankers' Trust Co. v. Texas & Pac. Ry. Co.*, 241 U.S. 295 (1916), nearly a century later, this Court interpreted the Texas & Pacific Railway Company's congressional charter, which stated that the company was able to "sue and be sued...in all courts of law and equity within the

United States." This Court held that the Congressional charter did not confer original jurisdiction with the federal courts for the following reason:

> Congress was not then concerned with the jurisdiction of courts, but with the faculties and powers of the corporation which it was creating; and evidently all that was intended was to render this corporation capable of suing and being sued by its corporate name in any court of law or equity—*Federal, state, or territorial*—whose jurisdiction as otherwise competently defined was adequate to the occasion. Had there been a purpose to take suits by and against the corporation out of the usual jurisdictional restrictions relating to the nature of the suit, the amount in controversy, and the venue, it seems reasonable to believe that *Congress would have expressed that purpose in altogether different words.*

Id. at 303 (emphasis added).

Then, in *D'Oench, Duhme*, while analyzing the question of whether a federal court in a non-diversity action must apply the conflict-of-laws rules of the forum state, this Court noted that the FDIC's Congressional charter granted original jurisdiction with the federal courts. *See D'Oench, Duhme & Co. v. Fed. Deposit Ins. Corp.*, 315 U.S. 447, 455-56 (1942). This Court relied on the plain language in the Banking Act of 1933, which granted the FDIC the power "to sue and be sued...in any court of law or equity, State or Federal," as well as the plain language in the 1935 amendment, which included

the provision that "All suits of a civil nature at common law or in equity to which the [FDIC] shall be a party *shall be deemed to arise under the laws of the United States.*" *Id.* at 455-56 & n.2. This Court also cited the Report of the Senate Committee on Banking and Currency, which makes clear that the purpose of this amendment was to confer original federal jurisdiction in FDIC cases. *Id.* at 455 & n.2; *see also S.G. v. Am. Nat. Red Cross*, 938 F.2d 1494, 1499 (1st Cir. 1991) ("The Report of the Senate Committee on Banking and Currency makes clear that the purpose of this amendment was to confer original federal jurisdiction in F.D.I.C. cases.") (citing S.Rep. No. 1007, 74th Cong., 1st Sess. 5), *rev'd on other grounds*, *Red Cross*, 505 U.S. 247.

Most recently, this Court analyzed the Red Cross's congressional charter, which states that the Red Cross is able "to sue and be sued in courts of law and equity, State and Federal, within the jurisdiction of the United States." *See Red Cross*, 505 U.S. at 248; *see also* 36 U.S.C. § 300105. This Court, in a 5-4 decision, held that its precedent established a rule that "a congressional charter's 'sue and be sued' provision may be read to confer federal court jurisdiction if, but only if, it specifically mentions the federal courts." *Red Cross*, 505 U.S. at 255. Thus, the inclusion of the word "Federal" in the Red Cross congressional charter conferred original jurisdiction in the federal courts. *Id.* at 257.

Fannie Mae's congressional charter is significantly distinguishable from the charters this Court has already analyzed. Whereas the Red Cross's congressional charter allows it "to sue and be sued in courts of law and equity, State and Federal, within the jurisdiction of the United

States," 36 U.S.C. § 300105, Fannie Mae's congressional charter requires it "to sue and be sued...in *any court of competent jurisdiction*, State and Federal," 12 U.S.C. § 1723a(a) (emphasis added). This Court has never directly analyzed whether this exact provision requires litigants to have an *independent* source of subject matter jurisdiction in order to proceed in state or federal court.

C. The Circuit Courts of Appeals are Divided as to Whether a Congressional Charter Permitting an Entity to "Sue and Be Sued...in any Court of Competent Jurisdiction, State or Federal" Confers Original Jurisdiction with the Federal Courts.

The Ninth Circuit and the D.C. Circuit have held that, when a congressional charter permits an entity to sue and be sued *in any court of competent jurisdiction*, state or federal, Congress intended to confer original jurisdiction over every case to which that entity is a party to the federal courts. On the other hand, the Second Circuit, Third Circuit, Fifth Circuit, and Seventh Circuit have held that such language allows the entity to be sued in any state or federal court that has an *independent* source of subject matter jurisdiction.

Prior to the Ninth Circuit's decision in this case, the only Circuit Court of Appeals to address the issue of whether Fannie Mae's congressional charter conferred original jurisdiction with the federal courts was the D.C. Circuit. *See Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust ex rel. Fed. Nat. Mortgage Ass'n v. Raines*, 534 F.3d 779 (D.C. Cir. 2008). In a split decision, the D.C. Circuit Court held that "there is federal jurisdiction

because the Fannie Mae 'sue and be sued' provision expressly refers to the federal courts in a manner similar to the Red Cross statute." *Id.* at 784. The court found that the 1954 amendment to Fannie Mae's congressional charter, in which Congress added the phrase "of competent jurisdiction," did not evidence Congress's intent to require an *independent* source of federal jurisdiction. *Id.* at 785-87. Rather, the court found that the phrase "of competent jurisdiction" clarifies that litigants in state courts of limited jurisdiction must satisfy appropriate jurisdictional requirements, that litigants in state and federal court must establish that court's personal jurisdiction of the parties, that litigants in federal court cannot bring their suit in *any* federal court, but should bring suit in federal district court, and that federal district courts have jurisdiction even over cases that might otherwise be heard in the Court of Federal Claims. *Id.* at 785.

Judge Brown's concurring decision found that the majority decision misunderstood the *Red Cross* decision to mean that the "sue and be sued" clause creates jurisdiction simply because it mentions the federal courts. *Id.* at 795 (Brown, J., concurring). Instead, Judge Brown interpreted *Red Cross* to mean that mentioning federal courts is necessary but not always sufficient to confer original jurisdiction with the federal courts. *Id.* at 795-96. Judge Brown distinguished Fannie Mae's congressional charter from that of the Red Cross based on the inclusion of the phrase "of competent jurisdiction" contained Fannie Mae's charter. *Id.* at 796-99. Judge Brown noted that the term "of competent jurisdiction" modifies the reference to both state and federal courts, and concluded that the provision allows Fannie Mae to be sued in a state or federal court that has an *independent* source of subject matter jurisdiction. *Id.* at 796-99.

Consistent with Judge Brown's concurring opinion in *Pirelli*, the Second Circuit, Third Circuit, Fifth Circuit, and Seventh Circuit have held that congressional charters, such as Fannie Mae's, in which Congress permitted the entity to sue and be sued in "any court of competent jurisdiction, State or Federal," do not confer original jurisdiction with the federal courts. The Second Circuit analyzed the congressional charter for Housing and Urban Development ("HUD"), which is nearly identical to Fannie Mae's in that it authorized the Secretary to "sue and be sued in any court of competent jurisdiction, State or Federal." *See C.H. Sanders Co. v. BHAP Hous. Dev. Fund Co.*, 903 F.2d 114, 118 (2d Cir. 1990); *see also* 12 U.S.C. § 1702. The Second Circuit held that the congressional charter was "only a waiver of sovereign immunity and not an independent grant of jurisdiction." *Id.* The Third Circuit similarly held that HUD's "sue and be sued" provision—which is nearly identical to Fannie Mae's—"makes the Secretary suable in his official capacity in a court which is *otherwise* of competent jurisdiction." *See Lindy v. Lynn*, 501 F.2d 1367, 1369 (3d Cir. 1974) (emphasis added). In evaluating a contract claim based on state law, the Third Circuit remanded the case to state court because it was "clear that the district court is not otherwise of competent jurisdiction to entertain this lawsuit." *Id.* The Fifth Circuit also held that HUD's "sue and be sued" provision "is plainly no more than a waiver of sovereign immunity and *requires another statute to grant jurisdiction* in order to make a court competent to hear a case against the Secretary otherwise authorized by Section 1702." *See Indus. Indem., Inc. v. Landrieu*, 615 F.2d 644, 647 (5th Cir. 1980) (emphasis added). The Fifth Circuit has reaffirmed this unambiguous holding in subsequent cases. *See, e.g., Lomas & Nettleton Co. v. Pierce*, 636 F.2d 971, 973 (5th Cir. 1981).

The Seventh Circuit Court of Appeals analyzed the congressional charter for the Department of Veteran Affairs, which permitted the Secretary to "sue and be sued... in any court of competent jurisdiction, State or Federal." *See W. Sec. Co., a subsidiary of Universal Mortgage Corp. v. Derwinski*, 937 F.2d 1276, 1279-80 (7th Cir. 1991); *see also* 38 U.S.C. § 3720(a)(1). The Seventh Circuit held that the congressional charter "is better read as a waiver of sovereign immunity than as a grant of jurisdiction," and that it "emphatically does not mean that it could have been filed in federal district court instead, for federal jurisdiction is statutory and [the 'sue and be sued' provision] is not a grant of jurisdiction." *Id.* at 1279.

With its decision below, the Ninth Circuit has rejected the interpretation of the Second, Third, Fifth and Seventh Circuit and adopted the D.C. Circuit's view that the statutory language permitting an entity to "sue and be sued...in any court of competent jurisdiction, State or Federal" confers original jurisdiction with the federal courts. Because the Circuit Courts of Appeals are split as to their interpretation of the language contained in Fannie Mae's congressional charter, this Court should grant this Petition to resolve the conflict.

D. The District Court Decisions Interpreting the Language Contained in Fannie Mae's Congressional Charter Lack Uniformity.

Some district courts, relying primarily on the bright-line rule stated by this Court in *Red Cross*, have held that Fannie Mae's federal charter confers original jurisdiction with the federal courts. *See, e.g., Jeong v. Fed. Nat'l Mortgage Ass'n*, No. A-14-CA-920-SS, 2014 WL 5808594,

at *2 n.1 (W.D. Tex. Nov. 7, 2014); *Fed. Home Loan Bank of Boston v. Ally Fin., Inc.*, No. 11–CV–10952, 2012 WL 769731, at *1–3 (D. Mass. Mar. 9, 2012); *Griffin v. Fed. Nat'l Mortgage Ass'n, Inc.*, No. 2:10-cv-00306-TJW-CE, 2010 WL 5535618, at *1-2 (E.D. Tex. Dec. 9, 2010); *Allen v. Wilford & Geske*, No. 10-4747, 2010 WL 4983487, at *2 (D. Minn. Dec. 2, 2010); *In re Fannie Mae 2008 Sec. Litig.*, No. 08 Civ. 7831, 2009 WL 4067266, at *3 (S.D.N.Y. Nov. 24, 2009); *Grun v. Countrywide Home Loans, Inc.*, No. 03–CV–0141, 2004 WL 1509088, at *2 (W.D. Tex. July 1, 2004); *Connelly v. Fed. Nat'l Mortgage Ass'n*, 251 F. Supp. 2d 1071, 1072-73 (D. Conn. 2003); *C.C. Port, Ltd. V. Davis-Penn Mortgage Co.*, 891 F. Supp. 371, 372 (S.D. Tex. 1994); *Peoples Mortgage Co., Inc. v. Fed. Nat'l Mortgage Ass'n*, 856 F. Supp. 910, 917 (E.D. Pa. 1994).

However, even in light of this Court's decision in *Red Cross* and the D.C. Circuit's decision in *Pirelli*, the district courts have split on this question. Many district courts have explicitly adopted the reasoning of Judge Brown's concurring decision in *Pirelli*. *See, e.g., Kennedy v. Fed. Nat'l Mortgage Ass'n*, No. 13–CV–203, 2014 WL 3905593, at *6 (E.D.N.C. Aug. 11, 2014) (acknowledging that Judge Brown's decision has been "widely-praised"); *Fed. Home Loan Bank of Indianapolis v. Banc of Am. Mortgage Sec., Inc.*, No. 10–CV–1463, 2011 WL 2133539, at *2 (S.D. Ind. May 25, 2011) (adopting Judge Brown's "well-reasoned" concurring decision); *Fed. Home Loan Bank of Chicago v. Banc of Am. Funding Corp.*, 760 F. Supp. 2d 807, 809 (N.D. Ill. 2011) (describing Judge Brown's concurring decision as "powerful" and adopting its reasoning). In fact, the majority of the district courts to consider this issue have held that the language contained in Fannie Mae's charter does not confer original jurisdiction. *See, e.g.*,

Warren v. Fed. Nat'l Mortgage Ass'n, No. 14–CV–0784, --- F. Supp. 3d ---, 2014 WL 4548638 (N.D. Tex. Sept. 15, 2014); *Kennedy v. Fed. Nat'l Mortgage Ass'n*, No. 13–CV–203, 2014 WL 3905593, at *5–6 (E.D.N.C. Aug. 11, 2014); *Fed. Nat'l Mortgage Ass'n v. Davis*, 963 F. Supp. 2d 532, 537-43 (E.D. Va. 2013); *Carter v. Watkins*, No. 12–CV–2813, 2013 WL 2139504, at *3–4 (D. Md. May 14, 2013); *Fed. Home Loan Bank of Indianapolis v. Banc of Am. Mortgage Sec., Inc.*, No. 10–CV–1463, 2011 WL 2133539, at *1–2 (S.D. Ind. May 25, 2011) (construing the FHLB's substantively identical sue-and-be-sued clause); *Fed. Home Loan Bank of Atlanta v. Countrywide Sec. Corp.*, No. 11–CV–489, 2011 WL 1598944, at *3 (N.D. Ga. Apr. 22, 2011) (construing FHLB charter); *Fed. Home Loan Bank of Chicago v. Banc of Am. Sec. LLC*, 448 B.R. 517, 527 (C.D. Cal. 2011) (construing FHLB charter); *Fed. Home Loan Bank of Chicago v. Banc of Am. Funding Corp.*, 760 F. Supp. 2d 807, 809–10 (N.D. Ill. 2011) (construing FHLB charter); *Rincon Del Sol, LLC v. Lloyd's of London*, 709 F. Supp. 2d 517, 522–25 (S.D. Tex. 2010); *Fed. Home Loan Bank of S.F. v. Deutsche Bank Secs., Inc.*, Nos. 10–3039, 10–3045, 2010 WL 5394742, at *6–8 (N.D. Cal. Dec. 20, 2010) (construing FHLB charter); *Fed. Home Loan Bank of Seattle v. Deutsche Bank Secs., Inc.*, 736 F.Supp.2d 1283, 1286 (W.D. Wash. 2010) (construing FHLB charter); *Knuckles v. RBMG, Inc.*, 481 F. Supp. 2d 559, 562–65 (S.D. W.Va. 2007); *Poindexter v. Nat'l Mortgage Co.*, No. 94 C 5814, 1995 WL 242287, at *10 (N.D. Ill. Apr. 24, 1995) ("12 USC § 1723a(a), is distinguished by the phrase 'in any court of competent jurisdiction, State or Federal,' implying that one must look elsewhere to determine competence").

With its decision below, the Ninth Circuit joined the D.C. Circuit in holding that Fannie Mae's congressional

charter confers original jurisdiction in the federal courts. However, both private individuals and corporate entities share a need for a conclusive judicial determination regarding the frequently reoccurring question of whether the federal courts have original jurisdiction over any case to which Fannie Mae is a party. Because there continues to be a conflict among federal courts regarding whether Fannie Mae's congressional charter confers original jurisdiction in the federal courts, Petitioners request that this Court grant this petition to resolve this issue. *See* U.S. S. Ct. R. 10(a).

II. The Question is of Significant National Importance.

Since the housing market crashed in 2007 and 2008, there has been a significant increase in lawsuits brought by or against Fannie Mae. Due to the increase in litigation, the issue of whether a congressional charter, such as Fannie Mae's, that allows an entity to "sue and be sued" "in any court of competent jurisdiction, State or Federal" confers original jurisdiction in the federal courts has arisen with considerable frequency. After conducting a preliminary review, Petitioners' counsel was able to identify 25 cases decided in the years since the housing market crashed, in which a district court was asked to determine whether the language contained in Fannie Mae's congressional charter conferred original jurisdiction in the federal courts. These cases are spread among the federal district courts of 13 states, located in 8 circuits. Without a decision from this Court, litigants will be forced to continue to engage in costly and time consuming litigation, removing cases to federal court on the basis of Fannie Mae's congressional charter and challenging removal on that basis.

Moreover, without a decision from this Court, whether litigants' are forced to proceed in federal or state court will largely depend on the views of the particular judge assigned to their case. For example, in the Southern District of Texas, United States District Court Judge Janis Jack held, without analysis, that, pursuant to 12 U.S.C. § 1723a, the federal court had original jurisdiction and the suit against Fannie Mae was properly removed. *See C.C. Port, Ltd. v. Davis-Penn Mortgage Co.*, 891 F. Supp. 371, 372 (S.D. Tex. 1994). In the same court, United States District Court Judge David Hittner issued one of the strongest rebukes of original jurisdiction based on Fannie Mae's congressional charter. *See Rincon Del Sol, LLC v. Lloyd's of London*, 709 F. Supp. 2d 517, 522–25 (S.D. Tex. 2010). This uncertainty and variation regarding jurisdiction fosters unnecessary and expensive litigation regarding removal jurisdiction and deprives litigants of due process.

Because of the significant differences between state and federal civil procedure, those plaintiffs who are fortunate enough to have their case remanded to state court have an advantage over plaintiffs who are forced to pursue their case in federal court. For example, in federal court, the jury verdict must be unanimous. *See* Fed. R. Civ. P. 48(b). However, in many state courts, a plaintiff can prevail without a unanimous jury verdict. *See, e.g.*, Alaska Stat. Ann. § 09.20.100 ("In a civil case tried by a jury in any court, whether of record or not, not less than five-sixths of the jury may render a verdict."); Ariz. Rev. Stat. Ann. § 21-102(C) ("A jury for trial in any court of record of a civil case shall consist of eight persons, and the concurrence of all but two shall be necessary to render a verdict."); Ark. R. Civ. P. 48 ("Where as many as nine out

of twelve jurors in a civil case agree upon a verdict, the verdict shall be returned as the verdict of such jury."); Cal. Civ. Proc. Code § 618 ("When the jury, or three-fourths of them, have agreed upon a verdict, they must be conducted into court and the verdict rendered by their foreperson."); Haw. Rev. Stat. § 635-20 ("In all civil cases tried before a jury it shall be sufficient for the return of a verdict if at least five-sixths of the jurors agree on the verdict."); Idaho R. Civ. P. 48 ("Three-fourths (¾) of the jury may render a verdict."); Kan. Stat. Ann. § 60-248(g) ("When the jury consists of 12 members, the agreement of 10 jurors is sufficient to render a verdict."); Ky. Rev. Stat. Ann. § 29A.280(3) ("The agreement of at least three-fourths (3/4) of the jurors is required for a verdict in all civil trials by jury in Circuit Court.").

By way of illustration only, and not by way of limitation, in the Southern District of Texas, a plaintiff prevailing in his motion to remand his case to state court before Judge Hittner, need only persuade five-sixths of the jurors at trial. *See* Tex. R. Civ. P. 292(a) ("[A] verdict may be rendered in any cause by the concurrence, as to each and all answers made, of the same ten or more members of an original jury of twelve or of the same five or more members of an original jury of six"). On the other hand, if that same plaintiff's case was assigned to Judge Jack, he would remain in federal court and would have to secure a unanimous verdict in order to prevail. *See* Fed. R. Civ. P. 48(b). It is plain that such differences can determine the outcome of certain cases. This Court should grant this petition for certiorari to create uniformity in the law because the outcome of one's case should turn on the merits, rather than the judge assigned to the case.

The question presented in this matter will also resolve conflict over the interpretation of various other statutes that contain nearly identical language to that in Fannie Mae's charter. *See, e.g.*, 12 U.S.C. § 1432 ("[Each Federal Home Loan Bank] shall have the power...to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal."); 12 U.S.C. § 1441(c)(8) ("[The Financing Corporation shall have the power] To sue and be sued in its corporate capacity, and to complain and defend in any action brought by or against the Financing Corporation in any State or Federal court of competent jurisdiction."); 12 U.S.C. § 1702 ("The Secretary [of HUD] shall... be authorized, in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal."); 12 U.S.C. § 3012(6) ("[The National Consumer Cooperative] Bank...shall have the power to... sue and be sued in its corporate name and complain and defend, in any court of competent jurisdiction, State or Federal"); 15 U.S.C. § 77dd ("The Corporation [of Foreign Security Holders] shall have power to adopt, alter, and use a corporate seal; to make contracts; to lease such real estate as may be necessary for the transaction of its business; to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal"); 38 U.S.C. § 3720(a)(1) ("the Secretary [of Veterans' Affairs] may sue and be sued in the Secretary's official capacity in any court of competent jurisdiction, State or Federal.").

III. The Ninth Circuit Incorrectly Held that Fannie Mae's Federal Charter Confers Federal Subject Matter Jurisdiction for Every Case to which Fannie Mae is a Party.

For the reasons set forth in Judge Brown's concurring opinion in *Pirelli* and Judge Stein's dissent in *Lightfoot*, the Ninth Circuit's decision below should be reversed. *See Pirelli*, 534 F.3d at 795-800 (Brown, J., concurring); *Lightfoot*, 769 F.3d at 690-99 (Stein, J., dissenting); *cf. Red Cross*, 505 U.S. at 265-75 (Scalia, J., dissenting).

In sum, the Ninth Circuit's decision is in conflict with well-established principles of statutory interpretation. Ordinarily, the plaintiff is entitled to select the forum in which he wishes to proceed. *See, e.g., Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 436 (2007) (referencing "the consideration ordinarily accorded the plaintiff's choice of forum"); *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 831–32 (2002) (discussing extent to which plaintiff is master of the complaint). As this Court has explained:

> Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant. Absent diversity of citizenship, federal-question jurisdiction is required. The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. *See Gully v. First National Bank*,

> 299 U.S. 109, 112–113, 57 S.Ct. 96, 97–98, 81 L.Ed. 70 (1936). The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.

Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987) ("Under the "well-pleaded complaint" doctrine, the plaintiff is master of his claim and may avoid federal removal jurisdiction by exclusive reliance on state law."). Further, due to federalism concerns, the removal statute should be construed strictly in favor of remand. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108–09 (1941); *Healy v. Ratta*, 292 U.S. 263, 270 (1934) ("The policy of the statute calls for its strict construction.").

In order to determine whether Congress intended to confer original jurisdiction in the federal courts, "[w]e start, of course, with the statutory text," and "[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *See Sebelius v. Cloer*, 133 S. Ct. 1886, 1893 (2013) (quoting *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006)); *see also Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994); *Perrin v. United States*, 444 U.S. 37, 42 (1979). Here, there is nothing in the statutory text that indicates that Congress intended Fannie Mae's "sue and be sued" provision to confer original jurisdiction with the federal courts. The provision permitting Fannie Mae to "sue and be sued... in any court of competent jurisdiction, State or Federal" does not distinguish among the federal courts, nor does it treat federal courts differently than state courts. *Cf. Red Cross*, 505 U.S. 267-68 (Scalia, J., dissenting). Here, the Ninth Circuit incorrectly held that Fannie Mae's

charter grants the federal district courts with jurisdiction over any such action, where no such language exists. *See Shoshone Mining Co.*, 177 U.S. at 506-7 ("If [Congress] had intended that any new rule of demarcation between the jurisdiction of the Federal and state courts should apply, it would likewise undoubtedly have said so. Leaving the matter as it did, it unquestionably meant that the competency of the court should be determined by rules theretofore prescribed in respect to the jurisdiction of the Federal courts"); *Deveaux*, 9 U.S. (5 Cranch) at 85-86 ("If jurisdiction is given by this clause to the Federal courts, it is equally given to all courts having original jurisdiction, and for all sums, however small they may be."); *Bankers' Trust*, 241 U.S. at 303 ("Had there been a purpose to take suits by and against the corporation out of the usual jurisdictional restrictions relating to the nature of the suit, the amount in controversy, and the venue, it seems reasonable to believe that *Congress would have expressed that purpose in altogether different words.*") (emphasis added).

The Supreme Court has repeatedly emphasized the phrase "competent jurisdiction" almost always refers to subject-matter jurisdiction. *See Wachovia Bank, Nat'l Ass'n v. Schmidt*, 546 U.S. 303, 316 (2006); *United States v. Morton*, 467 U.S. 822, 828 (1984); *Califano v. Sanders*, 430 U.S. 99, 106 n.6 (1977) ("[J]udicial review is to proceed 'in a court specified by statute' or 'in a court of competent jurisdiction.' Both of these clauses seem to look to outside sources of jurisdictional authority."); *Shoshone Mining Co.*, 177 U.S. at 506-7 (interpreting the phrase "in any court of competent jurisdiction" to mean any court with an independent sources of subject matter jurisdiction). When Congress uses statutory language that has been

given a consistent judicial construction, this Court often adheres to that construction in interpreting the statutory language. *See, e.g.*, *Keene Corp. v. United States*, 508 U.S. 200, 212–13 (1993); *Pierce v. Underwood*, 487 U.S. 552, 567 (1988); *Lorillard v. Pons*, 434 U.S. 575, 580–81 (1978). In Fannie Mae's congressional charter, the phrase "in any court of competent jurisdiction" modifies both "State" and "Federal." For the phrase "any court of competent jurisdiction" to have any meaning it should be read as differentiating between state and federal courts that possess "competent" jurisdiction—*i.e.*, an independent basis for jurisdiction—from those that do not. Thus, Fannie Mae's charter does not confer original jurisdiction in the federal courts, but rather indicates Congress's intent to require both state and federal courts to have an independent source of subject matter jurisdiction.

Had Congress intended to confer original jurisdiction with the federal courts, it certainly knew how to do so. *See, e.g.*, 12 U.S.C. § 1819(b)(1) ("[A]ll suits of a civil nature at common law or in equity to which the [FDIC] shall be a party *shall be deemed to arise under the laws of the United States.*"); 12 U.S.C. § 1441b ("any civil action, suit, or proceeding to which the Funding Corporation is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such action, suit, or proceeding"); 12 U.S.C. § 1452(f)(2) ("all civil actions to which the [Federal Home Loan Mortgage] Corporation is a party shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such actions, without regard to amount or value"); 12 U.S.C. § 2279aa-14(2) ("All civil actions to which the [Federal Agricultural Mortgage] Corporation is a party shall be deemed to arise under the

laws of the United States and, to the extent applicable, shall be deemed to be governed by Federal common law. The district courts of the United States shall have original jurisdiction of all such actions, without regard to amount of value."); 15 U.S.C. § 1819(b)(2)(a) ("[The Small Business Administration may] sue and be sued in any court of record of a State having general jurisdiction, or in any United States district court, and *jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy*") (emphasis added); 19 U.S.C. § 3473(b) ("Any such action to which the [Border Environment Cooperation] Commission is a party shall be deemed to arise under the laws of the United States, and the district courts of the United States (including the courts enumerated in section 460 of Title 28) shall have original jurisdiction of any such action."); 22 U.S.C. § 290m(g) ("any such action to which the [North American Development] Bank shall be a party shall be deemed to arise under the laws of the United States, and the district courts of the United States, including the courts enumerated in section 460 of Title 28, shall have original jurisdiction of any such action."); *see also Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver*, N.A., 511 U.S. 164, 177 (1994) ("If, as respondents seem to say, Congress intended to impose aiding and abetting liability, we presume it would have used the words 'aid' and 'abet' in the statutory text. But it did not."); *Pinter v. Dahl*, 486 U.S. 622, 650 (1988) ("When Congress wished to create such liability, it had little trouble doing so"); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 734 (1975) ("When Congress wished to provide a remedy to those who neither purchase nor sell securities, it had little trouble in doing so expressly"). However, Congress has not conferred original jurisdiction for every case to which Fannie Mae is a party to the federal courts.

This position is further supported by Congress's 1974 amendment to Fannie Mae's congressional charter. As noted by Judge Sidney H. Stein in his dissent below, prior to 1974, both Fannie Mae and Ginnie Mae were required to "maintain [their] principal office in the District of Columbia and shall be deemed, for purposes of venue in civil actions, to be a resident thereof." *See Lightfoot*, 769 F.3d at 697 (Stein, J., dissenting). In 1974, Congress amended this provision to provide that Fannie Mae "shall be deemed, for purposes of *jurisdiction* and venue in civil actions, to be a District of Columbia corporation." *Id.* (emphasis in original); *see* 12 U.S.C. § 1717(a)(2)(B). Congress intended this amendment to give Fannie Mae access to the federal courts pursuant to diversity of jurisdiction. *Id.* at 697-98. Fannie Mae would have no need to use diversity jurisdiction, if the federal courts had original jurisdiction over any case to which Fannie Mae was a party. Thus, Congress's decision to allow Fannie Mae to access federal courts through diversity jurisdiction evidences its understanding that the federal courts did not otherwise have original jurisdiction. This Court should grant a writ of certiorari because the Ninth Circuit incorrectly held that Fannie Mae's "sue and be sued" provision confers original jurisdiction in the federal courts.

IV. The Petition for a Writ of Certiorari Should Be Granted to Review This Court's Decision in *Red Cross*.

In its decision below, the Ninth Circuit relied heavily on the "bright-line" rule stated by this Court in *Red Cross*. *See Lightfoot*, 769 F.3d at 684 ("When federal charters, like those of the Red Cross and of Fannie Mae, 'expressly

authoriz[e] the organization to sue and be sued in federal courts ... the provision extends beyond a mere grant of general corporate capacity to sue, and suffices to confer federal jurisdiction.'") (*quoting Red Cross*, 505 U.S. at 257). For the reasons set forth in Justice Scalia's dissent in *Red Cross*, the majority's decision is not supported by either the plain language of the Red Cross federal charter or the legislative history, and is inconsistent with this Court's previous decisions that analyzed whether congressional charters confer original jurisdiction in the federal courts. *See Red Cross*, 505 U.S. at 265-75 (Scalia, J., dissenting). Accordingly, Appellants respectfully petition this Court to grant a writ of certiorari to review its decision in *Red Cross*.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — DENIAL OF REHEARING *EN BANC* IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED NOVEMBER 20, 2014

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-56068

CRYSTAL MONIQUE LIGHTFOOT;
BEVERLY ANN HOLLIS-ARRINGTON,

Plaintiffs-Appellants,

v.

CENDANT MORTGAGE CORPORATION,
doing business as PHH Mortgage; FREDDIE MAC;
ROBERT O. MATTHEWS; ATTORNEYS EQUITY
NATIONAL CORPORATION,

Defendants-Appellees.

D.C. No. 2:02-cv-06568-CBM-AJW
Central District of California,
Los Angeles

Before: TROTT and W. FLETCHER, Circuit Judges, and STEIN, District Judge.*

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*. The Honorable Sidney H. Stein, District Judge for the U.S. District Court for the Southern District of New York, sitting by designation.

Appendix A

Judge W. Fletcher has voted to deny the petition for rehearing en banc; and Judge Trott so recommends. Judge Stein recommends that the petition for rehearing *en banc* be granted.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter *en banc*. Fed. R. App. P. 35.

The petition for rehearing en banc, filed October 2, 2014, is hereby DENIED.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT FILED OCTOBER 2, 2014

United States Court of Appeals,
Ninth Circuit

Crystal Monique LIGHTFOOT;
Beverly Ann Hollis–Arrington,

Plaintiffs–Appellants,

v.

CENDANT MORTGAGE CORPORATION, doing business as PHH Mortgage; Fannie Mae; Robert O. Matthews; Attorneys Equity National Corporation,

Defendants–Appellees.

No. 10–56068
Argued and Submitted June 5, 2013
Filed Oct. 2, 2014.

Before: STEPHEN S. TROTT and WILLIAM A. FLETCHER, Circuit Judges, and SIDNEY H. STEIN, District Judge.*

Opinion by Judge W. Fletcher; Dissent by Judge Stein.

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* The Honorable Sidney H. Stein, District Judge for the U.S. District Court for the Southern District of New York, sitting by designation.

Appendix B

OPINION

W. FLETCHER, Circuit Judge:

Plaintiffs Beverly Ann Hollis–Arrington and Crystal Monique Lightfoot appeal the district court's judgment dismissing their claims against the Federal National Mortgage Association ("Fannie Mae"). They argue that the district court lacked subject matter jurisdiction over their claims. We disagree. Under the rule announced in *American National Red Cross v. S.G.*, 505 U.S. 247, 112 S.Ct. 2465, 120 L.Ed.2d 201 (1992), Fannie Mae's federal charter confers federal question jurisdiction over claims brought by or against Fannie Mae. We affirm the district court.

I. Background

This case is one of several brought by the plaintiffs following foreclosure proceedings initiated by Fannie Mae against Hollis–Arrington's home in West Hills, California. Hollis–Arrington first filed two suits in the United States District Court for the Central District of California, alleging numerous state-and federal-law claims against Fannie Mae and other defendants. The district court dismissed both suits, and we affirmed on appeal. *Hollis–Arrington v. Cendant Mortg. Corp.*, 61 Fed.Appx. 462 (9th Cir.2003); *Hollis–Arrington v. Cendant Mortg. Corp.*, 61 Fed.Appx. 463 (9th Cir.2003).

Plaintiffs then filed the present suit in California state court, alleging state-law claims similar or identical to

those in the two earlier federal suits. Fannie Mae removed to federal court, arguing that the sue-and-be-sued clause in its federal corporate charter conferred federal question subject matter jurisdiction. Plaintiffs filed a motion to remand, which the district court denied. The district court dismissed all of plaintiffs' claims as barred by res judicata and collateral estoppel. We initially affirmed in an unpublished disposition. *Lightfoot v. Cendant Mortg. Corp.*, 465 Fed.Appx. 668 (9th Cir.2012). We later withdrew that disposition, appointed pro bono counsel, and ordered the parties to brief whether Fannie Mae's federal charter granted the district court subject matter jurisdiction. *Lightfoot v. Cendant Mortg. Corp.*, No. 10–56068 (Apr. 13, 2012) (order withdrawing disposition).

II. Discussion

A. Fannie Mae's Charter

The sue-and-be-sued clause in Fannie Mae's charter authorizes Fannie Mae "to sue and be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal." 12 U.S.C. § 1723a(a). We hold that this language confers federal question jurisdiction over claims brought by or against Fannie Mae. In so holding, we do not write on a clean slate. In *Red Cross*, the Supreme Court gave us a clear rule for construing sue-and-be-sued clauses for federally chartered corporations. The Court held that "a congressional charter's 'sue and be sued' provision may be read to confer federal court jurisdiction if, but only if, it specifically mentions the federal courts." 505 U.S. at 255, 112 S.Ct. 2465.

Appendix B

The question in *Red Cross* was whether the American National Red Cross's federal charter conferred federal question jurisdiction over suits brought by or against the Red Cross. The sue-and-be-sued clause in the Red Cross's charter authorized the Red Cross "to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States." *Id.* at 248, 112 S.Ct. 2465. The Court held that the clause conferred federal question jurisdiction. *Id.* at 257, 112 S.Ct. 2465. Justice Scalia dissented for himself and three others. He and his fellow dissenters would have held that the clause conferred only corporate capacity to sue and be sued, and that subject matter jurisdiction had to be conferred by some other provision of federal law. *Id.* at 265, 112 S.Ct. 2465 (Scalia, J., dissenting).

The Court based its holding on a line of cases, stretching back to *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 6 L.Ed. 204 (1824), that made clear that a sue-and-be-sued clause for a federally chartered corporation confers federal question jurisdiction if it specifically mentions federal courts. *Red Cross*, 505 U.S. at 252–56, 112 S.Ct. 2465. The Court in *Osborn* held, in an opinion by Chief Justice Marshall, that a clause authorizing the second Bank of the United States "to sue and be sued ... in all state courts having competent jurisdiction and in any circuit court of the United States" conferred federal question jurisdiction. 22 U.S. (9 Wheat.) at 817–18. Chief Justice Marshall distinguished *Osborn* from *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 3 L.Ed. 38 (1809), in which the Court had held that the charter of the first Bank of the United States did *not* confer federal

subject matter jurisdiction because that bank's charter authorized the bank to "sue and be sued ... in Courts of record," without specifying the federal courts. *Osborn*, 22 U.S. (9 Wheat.) at 817–18; *Deveaux*, 9 U.S. (5 Cranch) at 85. Chief Justice Marshall wrote that, in contrast to the first bank's charter, the second bank's charter could not have been "more direct and appropriate" in conferring federal question jurisdiction. *Osborn*, 22 U.S. (9 Wheat.) at 817.

Almost a century later, the Court held in *Bankers' Trust Co. v. Texas & Pacific Railway*, 241 U.S. 295, 36 S.Ct. 569, 60 L.Ed. 1010 (1916), that a federal corporate charter did not confer federal question jurisdiction when it authorized a railroad "to sue and be sued ... in all courts of law and equity within the United States." *Id.* at 304–05, 36 S.Ct. 569. That language had "the same generality and natural import" as the language in *Deveaux* because it did not specifically mention the federal courts. *Id.* at 304, 36 S.Ct. 569; *see Red Cross*, 505 U.S. at 254, 112 S.Ct. 2465. Then, in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942), the Court upheld federal question jurisdiction based on a federal charter authorizing the Federal Deposit Insurance Corporation to sue or be sued "in any court of law or equity, State or Federal." *Id.* at 455, 62 S.Ct. 676.

The Court wrote in *Red Cross* that these cases established a "rule" that would have been known to Congress at least as far back as 1942, when *D'Oench* was decided. *Red Cross*, 505 U.S. at 255–57, 259–60, 112 S.Ct. 2465. When federal charters, like those of the Red Cross and of Fannie Mae, "expressly authoriz[e] the organization to sue and be sued

in federal courts ... the provision extends beyond a mere grant of general corporate capacity to sue, and suffices to confer federal jurisdiction." *Id.* at 257, 112 S.Ct. 2465. As the Court of Appeals for the D.C. Circuit has already held, that rule resolves this case. *See Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust ex rel. Fed. Nat'l Mortg. Ass'n v. Raines*, 534 F.3d 779, 784 (D.C.Cir.2008) (holding, based on Fannie Mae's charter, that federal question jurisdiction exists over suits brought by or against Fannie Mae).

Despite the specific reference to federal courts in Fannie Mae's sue-and-be-sued clause, our dissenting colleague contends that the clause does not confer federal question jurisdiction. Like Justice Scalia and his fellow dissenters in *Red Cross*, the dissent argues that the clause confers only corporate capacity to sue and be sued, and that subject matter jurisdiction must come from some other provision of federal law. Dissent at 23. The dissent relies on the phrase "court of competent jurisdiction" in the clause. Before 1954, Fannie Mae, like the Red Cross, had the statutory authority to "sue and be sued; complain and defend, in any *court of law or equity*, State or Federal." H.R.Rep. No. 83–1429, at 82 (1954) (emphasis added). In 1954, as one of many changes to Fannie Mae's charter, Congress amended Fannie Mae's sue-and-be-sued clause to authorize it "to sue and to be sued, and to complain and to defend, in any *court of competent jurisdiction*, State or Federal." Housing Act of 1954, Pub.L. No. 83–560, § 201, 68 Stat. 590, 620 (codified as amended at 12 U.S.C. § 1723a(a)) (emphasis added).

Appendix B

The dissent acknowledges that Fannie Mae's pre–1954 charter conferred federal question jurisdiction, but argues that Congress eliminated that jurisdiction by replacing the phrase "court of law or equity" with "court of competent jurisdiction." Dissent at 23–24. We disagree. Eliminating the charter's grant of federal question jurisdiction would have imposed a severe new restraint on Fannie Mae's ability to litigate in federal court. Under the general federal question jurisdiction statute, 28 U.S.C. § 1331, Fannie Mae would have been restricted by the well-pleaded complaint rule. *See, e.g., Franchise Tax Bd. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 9–10, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983); *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152, 29 S.Ct. 42, 53 L.Ed. 126 (1908). Given that Fannie Mae is often sued under state-law causes of action, § 1331 would have conferred jurisdiction in a relatively small number of cases. Diversity jurisdiction under 28 U.S.C. § 1332, if it existed at all, would have been unavailable in many, perhaps most, cases because Fannie Mae suits typically involve mortgage transactions to which there are multiple parties, often resulting in a lack of complete diversity. *See Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996).

There is no indication that Congress intended to eliminate federal question jurisdiction in 1954 by replacing the phrase "court of law or equity" with the phrase "court of competent jurisdiction." Neither the House nor the Senate report on Fannie Mae's 1954 amendments so much as mentions the "court of competent jurisdiction" language. *See* H.R.Rep. No. 83–1429, at 19–24, 43–50; S.Rep. No.

83–1472, at 33, 74–75 (1954). Given the important practical effect of eliminating federal question jurisdiction under Fannie Mae's sue-and-be-sued clause, we should expect the House or the Senate to have said something if they intended a change of that sort. Instead, there was silence.

In our view, the most likely explanation for replacing the phrase "court of law or equity" with "court of competent jurisdiction" is that Congress was simply modernizing Fannie Mae's charter. At our founding and for many years thereafter, the federal court system and most state court systems had separate law and equity courts. By the middle of the 20th century, however, the federal courts and almost every state had abandoned the law/equity division. *See* Leonard J. Emmerglick, *A Century of the New Equity*, 23 Tex. L.Rev. 244, 244 n.1 (1945). The Federal Rules of Civil Procedure merged law and equity in the federal courts in 1938. *Id.* By 1945, only five states continued to have separate law and equity courts. *Id.* At the time of the 1954 amendment, Fannie Mae's charter's reference to "court[s] of law or equity" had become an antiquarian relic with little relevance to the American legal system.

The change in Fannie Mae's sue-and-be-sued clause is best explained as getting rid of this anachronism, as Congress had recently done in other statutes. In 1948, in response to the Federal Rules of Civil Procedure's elimination of the law/equity distinction, Congress removed a number of references to "law or equity" in the statutes defining federal district court jurisdiction. *See* Act of June 25, 1948, Pub.L. No. 80–773, §§ 1332, 1343, 1345–46, 62 Stat. 869, 930–33; H.R.Rep. No. 80–3214, at A115, A121, A123 (1948).

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In 1954, as we discuss in more detail below, Congress exchanged "court of law or equity" for "court of competent jurisdiction" not just in Fannie Mae's charter, but also in the charters of the Federal Savings and Loan Insurance Corporation ("FSLIC") and the Home Loan Bank Board.

If Congress wanted to eliminate the grant of federal question jurisdiction from Fannie Mae's charter, it is highly unlikely that it would have done so in the way the dissent suggests. In 1954, Congress had no reason to think that replacing the phrase "court of law or equity" with the phrase "court of competent jurisdiction" would eliminate federal question jurisdiction under Fannie Mae's sue-and-be-sued clause. Supreme Court cases from *Deveaux* to *D'Oench* had put Congress on notice that a specific reference to the federal courts was "necessary *and sufficient* to confer jurisdiction." *Red Cross*, 505 U.S. at 252, 112 S.Ct. 2465 (emphasis added). The 1954 amendments, while using the new phrase "court of competent jurisdiction" in Fannie Mae's sue-and-be-sued clause, retained the specific reference to the federal courts. Congress would not have sought to eliminate federal question jurisdiction under Fannie Mae's sue-and-be-sued clause by retaining the very words the Court had recently held sufficient to *confer* such jurisdiction in *D'Oench*. *See Pirelli*, 534 F.3d at 786 ("If Congress in 1954 did not want to continue to confer federal jurisdiction in Fannie Mae cases, it logically would have omitted the word 'Federal' from the statute, not attempted a bank shot by adding the words 'of competent jurisdiction.' ").

Appendix B

Congress's contemporaneous treatment of the FSLIC shows that it knew a foolproof method to eliminate federal question jurisdiction from a sue-and-be-sued clause. That method was to follow *Deveaux* and simply to omit the reference to federal courts. In 1954, the same year Congress amended Fannie Mae's charter, Congress eliminated federal question jurisdiction for the FSLIC by deleting language in its charter that had authorized suit "in any court of law or equity, State or Federal." Congress replaced it with language authorizing suit "in any court of competent jurisdiction in the United States." *See* H.R.Rep. No. 83–1429, at 90; S.Rep. No. 83–1472, at 121. Since eliminating the reference to federal courts in the FSLIC amendment eliminated federal question jurisdiction over FSLIC suits brought under its sue-and-be-sued clause, Congress had no reason also to insert the phrase "court of competent jurisdiction" to accomplish the same thing. *See Corley v. United States*, 556 U.S. 303, 314, 129 S.Ct. 1558, 173 L.Ed.2d 443 (2009) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous...." (internal quotation marks omitted)).

The dissent argues that our holding renders superfluous the phrase "court of competent jurisdiction." Dissent at 19, 28. We disagree. As we explained above, the phrase served the purpose of eliminating an anachronistic reference to courts of law and equity. But if we need an additional purpose for the phrase, it is not hard to find one. In *Osborn*, the purpose of the phrase "in all State Courts having competent jurisdiction" was to emphasize that the clause did not authorize or require the exercise of

subject matter jurisdiction by a state court with narrow, specialized jurisdiction. *See* 22 U.S. (9 Wheat.) at 817. Fannie Mae's sue-and-be-sued clause can easily be read to have the same purpose. There was a general concern in the 1950s about the extent of federal authority to require state courts to hear cases brought pursuant to federal statutes. In *Testa v. Katt*, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947), the World War II-era federal Emergency Price Control Act required state courts to entertain civil suits for treble damages against merchants who charged a retail price exceeding the maximum set by federal law. The Act specified that federal and state courts had concurrent jurisdiction. Like Fannie Mae's charter, the Act authorized suit "in any court of competent jurisdiction." *Id.* at 387 n. 1, 67 S.Ct. 810. Rhode Island district and superior courts refused to hear a suit brought under the Act, contending that they were not obliged to hear a suit under a federal statute authorizing treble damages. *Id.* at 388, 67 S.Ct. 810. After determining that the state district and superior courts were courts "of competent jurisdiction" with "jurisdiction adequate and appropriate under established local law" to grant treble damages, the Court held in *Testa* that such courts were required to hear suits under the Act. *Id.* at 394, 67 S.Ct. 810.

It was in this historical setting that Congress added the phrase "court of competent jurisdiction" to Fannie Mae's charter. Consistent with *Testa*, the phrase requires state courts of general or otherwise competent jurisdiction to hear claims brought by and against Fannie Mae. The phrase makes clear that state courts of specialized

jurisdiction—such as family courts and small-claims courts—need not entertain suits that do not satisfy those courts' jurisdictional requirements. Similarly, the phrase also makes clear that the sue-and-be-sued clause does not require federal courts of specialized jurisdiction—such as bankruptcy courts—to hear suits falling outside those courts' jurisdiction. *Accord Pirelli*, 534 F.3d at 785.

Finally, the dissent points to several circuit court cases decided after 1954 that interpret the phrase "court of competent jurisdiction" the same way the dissent does. Dissent at 692 (citing *C.H. Sanders Co. v. BHAP Hous. Dev. Fund Co.*, 903 F.2d 114, 118 (2d Cir.1990); *Lomas & Nettleton Co. v. Pierce*, 636 F.2d 971, 973 (5th Cir.1981); *Bor–Son Bldg. Corp. v. Heller*, 572 F.2d 174, 181 (8th Cir.1978); *Lindy v. Lynn*, 501 F.2d 1367, 1368 (3d Cir.1974)). But all of these cases predate *Red Cross*. The only post-*Red Cross* cases cited by the dissent are district court decisions. Dissent at 693 & n. 2.

B. Legislative History

Our dissenting colleague makes two arguments based on legislative history that deserve a focused response. First, the dissent points to the history of the 1954 amendments. The House Bill, which used the phrase "court of competent jurisdiction," was designed to effectuate a transformation of Fannie Mae from a government-owned corporation to a privately owned, but still federally chartered, corporation. The Senate Bill, which retained the old phrase "in any court of law or equity," would not have changed the ownership of Fannie Mae. The House Bill prevailed. The

dissent concludes that the addition of the phrase "court of competent jurisdiction" in the 1954 amendments, taken from the House Bill, was designed to help effectuate the privatizing purpose of the bill.

Second, the dissent points to a 1974 amendment to Fannie Mae's charter. The amendment allowed Fannie Mae to change its principal place of business from the District of Columbia to the Virginia or Maryland suburbs, but specified that Fannie Mae would nonetheless remain a District of Columbia corporation "for purposes of jurisdiction." Housing and Community Development Act of 1974, Pub.L. No. 93–383, § 806(b), 88 Stat. 633, 727 (codified as amended at 12 U.S.C. § 1717(a)(2)). The dissent argues that if the 1954 sue-and-be-sued clause confers federal question jurisdiction, there would have been no need to confer District of Columbia corporate status on Fannie Mae in 1974, and thereby to confer diversity jurisdiction over suits to which Fannie Mae is a party.

1. The 1954 Amendments

The dissent relies heavily on the fact that the 1954 amendments were part of a broad reform reducing the federal government's role in Fannie Mae. The change to Fannie Mae's sue-and-be-sued clause, the dissent argues, must have furthered this "overriding purpose." Dissent at 695.

The dissent is correct that the 1954 amendments sought to minimize the federal government's ownership and operational role in Fannie Mae. But the 1954 amendments

did not completely privatize Fannie Mae, which remained, even after 1954, a federally chartered corporation with specific statutory requirements for its corporate governance. Not every part of the 1954 amendment served Congress's "overriding purpose" of privatization, and there is no reason that the phrase "court of competent jurisdiction" must be understood as serving this purpose, and there is no evidence showing that the change to Fannie Mae's sue-and-be-sued clause was part of the move toward privatization. Whether federal courts have federal question jurisdiction over Fannie Mae cases has nothing to do with "[s]ubstituting private sources of funds for Government expenditures," the primary means by which the House sought to privatize Fannie Mae. H.R.Rep. No. 83–1429, at 2; *see id.* at 695–96. The House Report went into great detail explaining the provisions of the 1954 amendments designed to privatize Fannie Mae. It never once mentioned the change to Fannie Mae's sue-and-be-sued clause.

Even more telling is Congress's simultaneous use of the identical phrase, "court of competent jurisdiction," in contexts that had nothing to do with either Fannie Mae or privatization. In the same Act that amended Fannie Mae's charter, Congress amended the FSLIC's charter by replacing the phrase "court of law and equity" with the phrase "court of competent jurisdiction." Housing Act of 1954 § 501(1). Also in the same Act, Congress added the phrase "court of competent jurisdiction" to the statute governing the Home Loan Bank Board ("HLBB"). Housing Act of 1954 § 503(2). The change to the FSLIC's sue-and-be-sued clause was one of very

few changes to the FSLIC's charter. *See* H.R.Rep. No. 83–1429, at 90–91; S.Rep. No. 83–1472, at 121–22. As we discussed above, Congress did eliminate federal question jurisdiction for the FSLIC, but it did so by eliminating any mention of federal courts. The change to the HLBB's sue-and-be-sued clause was unrelated to privatization. Indeed, with respect to jurisdiction, Congress made clear that it wanted to *increase* the HLBB's access to federal courts. Both the House and Senate explained that they were providing the HLBB the "means ... to enforce the laws and regulations under which Federal savings and loan associations operate." H.R.Rep. No. 83–1429, at 27; S.Rep. No. 83–1472, at 43. The Senate report specifically stated that HLBB "proceedings could be in the Federal judicial district in which the association is located." S.Rep. No. 83–1472, at 43; *see also* H.R.Rep. No. 83–1429, at 27.

As a postscript to the 1954 amendments, in 1968 Congress split Fannie Mae into two corporations, Fannie Mae and the Government National Mortgage Association ("Ginnie Mae"). Housing and Urban Development Act of 1968, Pub.L. No. 90–448, § 801, 82 Stat. 476, 536 (1968) (codified as amended at 12 U.S.C. § 1716b). Both Fannie Mae and Ginnie Mae remained federally chartered, but Fannie Mae became entirely privately owned and Ginnie Mae became entirely federally owned. *See id.* Yet Fannie Mae and Ginnie Mae kept precisely the same sue-and-be-sued clause, authorizing them both "to sue and be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal." 12 U.S.C. § 1723a. If the phrase "court of competent jurisdiction" had been used in 1954 as part of an overall plan to privatize Fannie Mae

and to limit its access to federal courts, Congress would not have used that same phrase in Ginnie Mae's charter.

2. The 1974 Amendment

The 1974 amendment to the Housing Act changed the sentence "[Fannie Mae] shall maintain its principal office in the District of Columbia and shall be deemed, for purposes of venue in civil actions, to be a resident thereof" to read, "[Fannie Mae] shall maintain its principal office in the District of Columbia *or the metropolitan area thereof* and shall be deemed, *for purposes of jurisdiction* and venue in civil actions, to be a District of Columbia corporation." Housing and Community Development Act of 1974 § 806(b) (emphasis added).

The dissent argues that this change shows that Congress, in light of the elimination of federal question jurisdiction effectuated by the 1954 amendment to Fannie Mae's sue-and-be-sued clause, sought to authorize diversity jurisdiction under 28 U.S.C. § 1332 over suits in which Fannie Mae was a party. If it were clear that the 1974 amendment was intended to confer diversity jurisdiction over Fannie Mae cases, this could suggest that Congress belatedly realized that it had eliminated federal question jurisdiction by its amendment to Fannie Mae's sue-and-be-sued clause, and now sought, twenty years later, to provide some basis for federal subject matter jurisdiction. *See* Dissent at 697–98. But we do not believe that this was the purpose of the 1974 amendment.

Appendix B

The "jurisdiction" to which the 1974 amendment refers is almost certainly not subject matter jurisdiction. The reference is almost certainly to personal jurisdiction. The purpose of the amendment was almost certainly to allow Fannie Mae to move its principal place of business out of the District of Columbia to the Virginia or Maryland suburbs, and at the same time to make clear that Fannie Mae would be subject to general personal jurisdiction only in the District even if it moved its principal place of business into the suburbs.

A corporation, like an individual, is subject to specific jurisdiction in a forum when its activities in that forum have given rise to the suit. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, ---U.S. ----, 131 S.Ct. 2846, 2853, 180 L.Ed.2d 796 (2011). A corporation is subject to general jurisdiction only where it is "essentially at home." *Id.* at 2851; *see Daimler AG v. Bauman*, --- U.S. ----, 134 S.Ct. 746, 755–58, 187 L.Ed.2d 624 (2014). The two places where a corporation is "essentially at home" and therefore subject to general jurisdiction are its place of incorporation and its principal place of business. *Daimler*, 134 S.Ct. at 760. In the 1974 amendment, Congress specified that Fannie Mae would be "deemed" a District of Columbia corporation "for purposes of jurisdiction" and thus subject to general jurisdiction only in the District, despite the possibility that it might move its principal place of business to the suburbs. *See* 12 U.S.C. § 1717(a)(2)(B).

The legislative history of the 1974 amendment is consistent with this reading. The House subcommittee summarized the amendment as "provid[ing] that the principal office of

FNMA be located in the District of Columbia metropolitan area, as well as in the District of Columbia, though for jurisdiction and venue purposes FNMA would be considered a District corporation." Subcomm. on Hous. of the Comm. on Banking and Currency, 93d Cong., Compilation of the Housing and Community Development Act of 1974, at 277 (Comm. Print 1974); *see also id.* at 379 (summarizing the amendment as "permit[ing] the principal office of FNMA to be located in the District of Columbia metropolitan area, as well as in the District of Columbia, though for jurisdiction and venue purposes FNMA is to be considered a District resident"). The legislative history contains no mention of the possibility that the amendment was intended to authorize diversity jurisdiction based on newly conferred District of Columbia citizenship for Fannie Mae. Rather, the legislative history strongly suggests that the amendment was intended to allow Fannie Mae to move its principal place of business to the suburbs without effecting any change to the place where it would be subject to general jurisdiction. That is, Fannie Mae could move to the suburbs, "though for jurisdiction and venue purposes [it] would be considered a District corporation." *Id.* at 277.

The dissent cites two other statutes as examples of Congress creating diversity jurisdiction for federally chartered corporations. Dissent at 697–98. But both statutes support reading the 1974 Fannie Mae amendment as referring to personal rather than subject matter jurisdiction. Both statutes expressly refer to the corporation a "citizen" of the relevant forum. *See* 7 U.S.C. § 941(c) ("The telephone bank ... shall, for the purposes of jurisdiction and venue, be

deemed a *citizen* and resident of the District of Columbia." (emphasis added)); 28 U.S.C. § 1348 ("All national banking associations shall, for the purposes of all other actions by or against them, be deemed *citizens* of the States in which they are respectively located." (emphasis added)). Federal law defines diversity jurisdiction in terms of citizenship, 28 U.S.C. § 1332(a), so when Congress sought to authorize diversity jurisdiction in these two statutes, it used the word "citizen." Unlike these two statutes, Fannie Mae's 1974 amendment does not use the word "citizen." Rather, it provides only that Fannie Mae is a "District of Columbia corporation." 12 U.S.C. § 1717(a)(2)(B).

Conclusion

We hold that the sue-and-be-sued clause in Fannie Mae's federal charter confers federal question jurisdiction over suits in which Fannie Mae is a party. Accordingly, we hold that the district court had subject matter jurisdiction over plaintiffs' claims. We affirm the district court's dismissal of plaintiffs' claims for the reasons stated in our previous unpublished disposition. *Lightfoot*, 465 Fed.Appx. at 669.

AFFIRMED.

STEIN, District Judge, dissenting:

Fannie Mae's charter gives the company the power "to sue and to be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal." 12 U.S.C. § 1723a(a). Unlike the corporate charter at issue in *American National Red Cross v. S.G.*, 505 U.S. 247,

112 S.Ct. 2465, 120 L.Ed.2d 201 (1992), Fannie Mae's sue-and-be-sued clause contains a proviso—the phrase "of competent jurisdiction." The majority offers a few potential readings of this phrase, but each of these constructions effectively renders the proviso superfluous. But the phrase "of competent jurisdiction" is not a potted plant; it must mean something. With the proviso included, Fannie Mae's sue-and-be-sued clause does not confer automatic federal subject matter jurisdiction over any action to which Fannie Mae is a party; jurisdiction must arise from some other source. I therefore respectfully dissent.

I. The *Red Cross* Default Rule

Congress has used the sue-and-be-sued clauses of federal corporations to achieve multiple goals. Most obviously, these clauses make clear that the federal entity—as opposed to, for example, its administrator—has the ability to engage in litigation. *See Fed. Hous. Admin. v. Burr*, 309 U.S. 242, 245, 60 S.Ct. 488, 84 L.Ed. 724 (1940). Congress also uses these clauses to confirm that a federally created entity cannot invoke sovereign immunity. *See id.* at 249, 60 S.Ct. 488. And Congress may also draft a sue-and-be-sued clause to confer federal jurisdiction upon any suit to which the federal corporation is a party.

A hoary line of U.S. Supreme Court precedent sets forth how Congress may achieve this final goal. The Court first considered this question in *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 3 L.Ed. 38 (1809), with Chief Justice Marshall writing. The corporation in that case was the first Bank of the United States, and its

charter empowered the Bank "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in courts of record, or any other place whatsoever." *Id.* at 85. The Court concluded that this section merely granted the Bank the capacity to sue. It did not "enlarge the jurisdiction of any particular court." *Id.*

Two lines of reasoning supported this holding. First, the Court concluded that automatic access to the federal courts did not necessarily follow from a generic authorization to sue and be sued. *See id.* at 85–86. Second, a different section of the Bank's charter explicitly provided for federal jurisdiction in certain suits against the president and directors of the Bank. *See id.* at 86. "This," the Chief Justice announced, "evinces the opinion of congress, that the right to sue does not imply a right to sue in the courts of the union, unless it be expressed." *Id.*

Congress seemingly responded to the Court's ruling when it chartered the second Bank of the United States. The relevant section of the second Bank's charter gave it the right "to sue and be [sued], plead and be impleaded, answer and be answered, defend and be defended, in all State Courts having competent jurisdiction, and in any Circuit Court of the United States."[1] *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 817, 6 L.Ed. 204

1. At the time the second Bank was chartered, the circuit courts had both original and appellate jurisdiction over certain civil actions. *See Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247, 256 n. 8, 112 S.Ct. 2465, 120 L.Ed.2d 201 (1992); Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and the Federal System 22, 30 n.65 (6th ed.2009).

(1824). The *Osborn* Court, once again through Chief Justice Marshall, determined that unlike the language at issue in *Deveaux*, the second Bank's charter unambiguously conferred federal subject matter jurisdiction. *Id.* at 817–18.

Deveaux and *Osborn* together established a default rule for determining whether a federal corporation's sue-and-be-sued clause confers federal subject matter jurisdiction. As the Supreme Court summarized in *American National Red Cross v. S.G.*, 505 U.S. 247, 112 S.Ct. 2465, 120 L.Ed.2d 201 (1992): "a congressional charter's 'sue and be sued' provision may be read to confer federal court jurisdiction if, but only if, it specifically mentions the federal courts." *Id.* at 255, 112 S.Ct. 2465.

The clause at issue in that case gave the Red Cross the power "to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States." *Id.* at 248, 112 S.Ct. 2465. This language went beyond the general authorization of *Deveaux*. *See id.* at 256–57, 112 S.Ct. 2465. In addition, the Red Cross's clause was "in all relevant respects identical" to a charter provision that the Court held to confer jurisdiction in *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942). *See Red Cross*, 505 U.S. at 257, 112 S.Ct. 2465. Importantly, Congress amended the relevant provision of the Red Cross's charter just five years after *D'Oench* was decided. *See id.* at 260, 112 S.Ct. 2465. The plain language and statutory history together compelled the conclusion that the Red Cross's charter gave federal courts subject matter jurisdiction over suits to which the company was a party.

Appendix B

Red Cross provides the Supreme Court's most recent pronouncement on the jurisdictional implications of federal sue-and-be-sued clauses. However, *Red Cross* did not announce any new rule of law. *See id.* at 255–57, 112 S.Ct. 2465. Rather, the Court simply restated the "rule established" in the Court's twin decisions of *Osborn* and *Deveaux*. *Id.* at 257, 112 S.Ct. 2465. *Red Cross* thus did not announce a magic-words test that ends all inquiry the moment we come across the word "federal"; it restated a default rule to assist Congress and the courts in writing and interpreting sue-and-be-sued clauses.

Recognizing that the rule in *Red Cross* is a default has an important implication—it means that Congress can draft exceptions to the rule. When Congress creates corporations, it "has full authority to make such restrictions on the 'sue and be sued' clause as seem to it appropriate or necessary." *Fed. Hous. Admin. v. Burr*, 309 U.S. 242, 249, 60 S.Ct. 488, 84 L.Ed. 724 (1940); *cf. Fed. Sav. & Loan Ins. Corp. v. Ticktin*, 490 U.S. 82, 86–87 & n. 5, 109 S.Ct. 1626, 104 L.Ed.2d 73 (1989) (Congress can write provisos that limit "broad grant[s] of federal jurisdiction."). Counsel for Fannie Mae nicely summarized this point at oral argument: "If Congress says you can sue or be sued in federal court, that is at least a profoundly strong default rule ... and you'd have to find something else in the statute that says even though we want you to sue in federal court, we don't really mean it." Oral Arg. Rec. at 28:58.

Red Cross did not tie Congress' hands, preventing it from crafting sue-and-be-sued clauses as it deems fit. We cannot

ignore the "of competent jurisdiction" proviso; we must determine what it means. The *Red Cross* default rule gives us the starting point for our analysis of Fannie Mae's sue-and-be-sued clause. The Supreme Court's application of the default rule over the past two centuries defines the interpretive tools for our analysis. Using this approach, Fannie Mae's sue-and-be-sued clause allows for only one reading—a court must have an independent basis of jurisdiction to hear a suit involving that company.

II. The Plain Language of Fannie Mae's Sue–And–Be–Sued Clause

As noted, Fannie Mae's charter grants the company the power "to sue and to be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal." 12 U.S.C. § 1723a(a). Absent the "of competent jurisdiction" proviso, this clause would clearly confer jurisdiction on the federal courts. *See D'Oench*, 315 U.S. at 455, 62 S.Ct. 676. The true question before this Court, then, is what the proviso means. On its face, the phrase "of competent jurisdiction" "look[s] to outside sources of jurisdictional authority." *Califano v. Sanders*, 430 U.S. 99, 106 n. 6, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). When "of competent jurisdiction" modifies "State" courts, the proviso instructs us to look for a jurisdictional hook in that state's law. *See Osborn*, 22 U.S. (9 Wheat.) at 817. The proviso performs the same function when it modifies "Federal" courts. No court—state or federal—is competent to hear a suit involving Fannie Mae unless it has subject matter jurisdiction by some means other than Fannie Mae's sue-and-be-sued clause.

Congress has utilized substantively identical language in other sue-and-be-sued clauses, and the courts of appeals have overwhelmingly agreed that an "of competent jurisdiction" proviso requires an alternative basis of jurisdiction. Fannie Mae has directed our attention in particular to the sue-and-be-sued provision that authorizes the Administrator of the Federal Housing Administration "to sue and be sued in any court of competent jurisdiction, State or Federal." 12 U.S.C. § 1702. A long line of cases has held that this statute does not confer federal jurisdiction. *See C.H. Sanders Co. v. BHAP Hous. Dev. Fund Co.*, 903 F.2d 114, 118 (2d Cir.1990); *Lomas & Nettleton Co. v. Pierce*, 636 F.2d 971, 973 (5th Cir.1981); *Bor–Son Bldg. Corp. v. Heller*, 572 F.2d 174, 181 (8th Cir.1978); *Lindy v. Lynn*, 501 F.2d 1367, 1368 (3d Cir.1974). This very Circuit has followed the non-jurisdictional interpretation of the statute, albeit in dicta. *See Munoz v. Small Business Admin.*, 644 F.2d 1361, 1365 n. 3 (9th Cir.1981). The majority criticizes my reliance on these cases because they were handed down prior to *Red Cross*, which, as set forth above, announced no new rule of law. But if the majority seeks post-*Red Cross* cases that agree with this dissent that an independent basis is needed to support federal subject matter jurisdiction for Fannie Mae, we need only look to the numerous district court opinions in this Circuit that the majority overrules with its decision. As district judge Dean Pregerson recently summarized, "courts in this circuit appear to have uniformly reached the [ ] conclusion" that Fannie Mae's charter does not confer federal subject matter jurisdiction. *Fed. Nat'l Mortgage Ass'n v. Moreno*, No. 14–CV–2984, 2014 WL 1922955, at *2

(C.D.Cal. May 14, 2014) (collecting cases). Judge Pregerson concurred with that significant consensus.[2] *See id.*

In sum, when Congress has included "of competent jurisdiction" provisos in sue-and-be-sued clauses, courts have honored Congress' intent and ruled these clauses

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2. The district courts in our circuit are not alone in their consensus that Fannie Mae's sue-and-be-sued clause does not confer federal subject matter jurisdiction. Indeed, this appears to be the position of the majority of those district courts in all circuits that have written on this issue. *See Warren v. Fed. Nat'l Mortg. Ass'n*, No. 14–CV–0784, ——F.Supp.3d ——, 2014 WL 4548638 (N.D.Tex. Sept. 15, 2014); *Kennedy v. Fed. Nat'l Mortg. Ass'n*, No. 13–CV–203, 2014 WL 3905593, at *5–6 (E.D.N.C. Aug. 11, 2014); *Fed. Nat'l Mortg. Ass'n v. Davis*, 963 F.Supp.2d 532, 537–43 (E.D.Va.2013); *Carter v. Watkins*, No. 12–CV–2813, 2013 WL 2139504, at *3–4 (D.Md. May 14, 2013); *Fed. Home Loan Bank of Indianapolis v. Banc of Am. Mortg. Sec., Inc.*, No. 10–CV–1463, 2011 WL 2133539, at *1–2 (S.D.Ind. May 25, 2011) (construing the FHLB's substantively identical sue-and-be-sued clause); *Fed. Home Loan Bank of Atlanta v. Countrywide Sec. Corp.*, No. 11–CV–489, 2011 WL 1598944, at *3 (N.D.Ga. Apr. 22, 2011) (construing FHLB charter); *Fed. Home Loan Bank of Chicago v. Banc of Am. Funding Corp.*, 760 F.Supp.2d 807, 809–10 (N.D.Ill.2011) (construing FHLB charter); *Rincon Del Sol, LLC v. Lloyd's of London*, 709 F.Supp.2d 517, 522–25 (S.D.Tex.2010); *Knuckles v. RBMG, Inc.*, 481 F.Supp.2d 559, 562–65 (S.D.W.Va.2007). Those district courts that have sided with the majority have done so without an extended discussion of this question. *See Fed. Home Loan Bank of Boston v. Ally Fin., Inc.*, No. 11–CV–10952, 2012 WL 769731, at *1–3 (D.Mass. Mar. 9, 2012); *In re Fannie Mae 2008 Sec. Litig.*, No. 08 Civ. 7831, 2009 WL 4067266, at *3 (S.D.N.Y. Nov. 24, 2009); *Grun v. Countrywide Home Loans, Inc.*, No. 03–CV–0141, 2004 WL 1509088, at *2 (W.D.Tex. July 1, 2004).

to not confer subject matter jurisdiction. Fannie Mae's sue-and-be-sued clause should be no different.

The majority offers two alternative readings for the "of competent jurisdiction" proviso. Neither is persuasive. First, the majority suggests that the proviso was part of Congress' drive to modernize the U.S.Code in the mid–20th century. During this period, law and equity were merged in the federal courts and in a majority of the states. *See* Fed.R.Civ.P. 2. The merger largely rendered references to "courts of law and equity" into historical curiosities. As the majority correctly points out, when Congress amended title 28 of the U.S.Code, it cleaned up these references in the sections that confer jurisdiction on the district courts. Congress went about its task expeditiously—it simply deleted references to courts of law or equity.[3] Congress did not replace these phrases with new references to "courts of competent jurisdiction" for a singularly valid reason. As explained above, the phrase "of competent jurisdiction" signals that the section containing that phrase will not also harbor a grant of jurisdiction. It would make no sense to include this proviso in a section designed to confer jurisdiction.

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3. *Compare* 28 U.S.C. § 41(1) (1946), *with* Act of June 25, 1948, ch. 646, §§ 1331, 1332, 1345, 62 Stat. 869, 930, 933 (deleting reference to "suits of a civil nature, at common law or in equity"); *compare* 28 U.S.C. § 41(7), (14) (1946), *with* ch. 646, §§ 1338, 1343, 62 Stat. at 931–32 (deleting references to "suits at law or in equity"); *and compare* 28 U.S.C. § 41(20) (1946), *with* ch. 646, § 1346, 62 Stat. at 933 (deleting reference to "a court of law, equity, or admiralty").

Next, the majority offers that the "of competent jurisdiction" proviso could be read to emphasize that state and federal courts of specialized jurisdiction need not hear cases involving Fannie Mae purely on the basis of its sue-and-be-sued clause. There are two flies in the ointment of this reading.

First, the majority relies on the *Osborn* Court's interpretation of the second Bank's charter, which authorized the Bank to sue "in all State Courts having competent jurisdiction." *Osborn*, 22 U.S. (9 Wheat.) at 817. According to the majority, this phrase ensured that "a state court with narrow, specialized jurisdiction" was not required to hear any case involving the Bank. Majority Op. at 686. This is an unduly narrow reading of the clause. In fact, the second Bank's charter made clear that *no* state court was required to hear a suit involving the Bank, unless that court had a free-standing basis for jurisdiction. This reading accords with the understood relationship between Congress and the state courts around the time the second Bank was chartered: "I hold it to be perfectly clear, that Congress *cannot confer jurisdiction* upon any Courts, but such as exist under the constitution and laws of the United States, although the State Courts may exercise jurisdiction on cases authorized by the laws of the State, and not prohibited by the exclusive jurisdiction of the federal Courts." *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 27–28, 5 L.Ed. 19 (1820) (emphasis added). The "of competent jurisdiction" proviso serves precisely the same purpose in Fannie Mae's charter—the only difference is that the proviso applies to the courts of the states and the federal government.

Second, *Red Cross* forecloses the majority's construction of the "of competent jurisdiction" proviso. The Red Cross's charter gave that organization the power "to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States." *Red Cross*, 505 U.S. at 248, 112 S.Ct. 2465. In his dissenting opinion, Justice Scalia argued that if this sue-and-be-sued clause must confer federal jurisdiction, it must confer jurisdiction on *all* the federal courts, including those of specialized jurisdiction. *See id.* at 267, 112 S.Ct. 2465 (Scalia, J., dissenting). The Court rejected this approach and held that the Red Cross's charter confers automatic jurisdiction only in the district courts—today, the sole federal courts of broad original jurisdiction. *See id.* at 256 n. 8, 112 S.Ct. 2465 (majority opinion). *Red Cross* therefore demonstrates that Congress does not need an "of competent jurisdiction" proviso to ensure that Fannie Mae will not foist itself upon federal courts of specialized jurisdiction. The majority's reading of the proviso would render it entirely superfluous.

The majority claims that *Testa v. Katt*, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947), provides an historical backdrop for its interpretation of the sue-and-be-sued clause. This is an interesting hypothetical, but one without relevance to the issue presented in this case. *Testa* restated the uncontroversial proposition that state courts cannot refuse to hear federal causes of action when those courts entertain similar state law causes of action. *See id.* at 394, 67 S.Ct. 810; *see also, e.g., Haywood v. Drown*, 556 U.S. 729, 735–36, 129 S.Ct. 2108, 173 L.Ed.2d 920 (2009). But Congress did not give Fannie Mae a proprietary

cause of action when it amended the company's charter in 1954. When Fannie Mae sues or is sued, the cause of action must derive from a separate realm of federal law or, more likely, from state law. *See, e.g., Welch v. Burton*, 221 Ark. 173, 252 S.W.2d 411, 413 (1952) (Fannie Mae joined as defendant in quiet title action); *Malcolm MacDowell & Assocs. v. Ecorse–Lincoln Park Bank*, 325 Mich. 591, 38 N.W.2d 921, 921–22 (1949) (Fannie Mae sued for breach of a mortgage-related contract). *Testa* does not evidence a midcentury climate of fear that federal *entities* would be denied access to state courts, especially in cases touching on state property and mortgage law.

The Red Cross default rule does not allow us to ignore the "of competent jurisdiction" proviso—it must mean something. The only natural reading of this phrase instructs us to look for a source of jurisdiction outside of Fannie Mae's sue-and-be-sued clause.

III. The Legislative Context of Fannie Mae's Sue–And–Be–Sued Clause

Looking beyond the plain language of Fannie Mae's sue-and-be-sued clause, the history of Congress' amendments to this statute reinforces the conclusion that the clause does not confer federal subject matter jurisdiction.

A. The 1954 amendment

Prior to 1954, Fannie Mae's sue-and-be-sued clause gave it the power "[t]o sue and be sued, complain and defend, in any court of law or equity, State or Federal."

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Nat'l Housing Act, ch. 847, § 301(c)(3), 48 Stat. 1246, 1253 (1934). This clause inarguably gave Fannie Mae access to the federal courts. *See D'Oench*, 315 U.S. at 455, 62 S.Ct. 676. But knowing this, Congress in 1954 struck the language "in any court of law or equity," and replaced it with "in any court of competent jurisdiction." It is a basic tenet of statutory interpretation that "[w]hen Congress acts to amend a statute, [courts] presume it intends its amendment to have real and substantial effect." *Stone v. I.N.S.*, 514 U.S. 386, 397, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995). Indeed, the Supreme Court in *Red Cross* reinforced the importance of this canon in the context of sue-and-be-sued clauses. *See Red Cross*, 505 U.S. at 260, 112 S.Ct. 2465. Congress thus emphasized the non-jurisdictional implications of the "of competent jurisdiction" proviso by adding it to a previously jurisdiction-conferring statute.

Congress' motivation and method in amending Fannie Mae's charter have proved obscure to some. *See Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust ex rel. Fed. Nat'l Mortg. Ass'n v. Raines*, 534 F.3d 779, 786–87 (D.C.Cir.2008). It is true that the legislative history behind the 1954 amendment does not expressly discuss the addition of the "of competent jurisdiction" proviso. But the legislative history does reveal that Congress intended to reduce the footprint of the federal government in the national housing market. Congress' amendment to Fannie Mae's sue-and-be-sued clause was simply one facet of this overriding purpose.

The 1954 Act was prompted by President Eisenhower's desire to "develop a new and revitalized housing program

better adapted to current requirements, which would clearly identify the proper role of the Federal Government in the housing field and outline more economical and effective means for improving the housing conditions of our people." H.R.Rep. No. 83–1429, at 1 (1954). As the House Committee on Banking and Currency put it, one of the Act's "basic objectives" was "[s]ubstituting private sources of funds for Government expenditures whenever possible, especially in connection with the provision of a secondary market for home mortgages." *Id.* at 2.

The House passed H.R. 7839—a version of the 1954 Act that would dramatically remake Fannie Mae. Pursuant to H.R. 7839, Fannie Mae would be dissolved and rechartered "with substantial changes in its authority and with provision for the eventual substitution of private capital for Government investment in its secondary market operations." H.R.Rep. No. 83–1429, at 18. The new Fannie Mae would issue capital stock to the Secretary of the Treasury and convertible bonds to private investors. *See id.* at 18–19. Once the capital stock owned by the Secretary was retired, the convertible bonds could be exchanged for common stock and Fannie Mae could issue more common stock directly to the public. *See id.* at 18–19, 43–45. Notably for our purposes, the House bill included the "of competent jurisdiction" proviso in Fannie Mae's amended corporate charter. *See id.* at 89–90.

The Senate Committee on Banking and Currency strongly disagreed with the House's treatment of Fannie Mae. That Committee did not believe that "the testimony and facts presented to it warrant[ed] the sweeping action

contained in" the House bill. S.Rep. No. 83–1472, at 33 (1954), 1954 U.S.C.C.A.N. 2723. The Senate proposed only minor changes to Fannie Mae's then-existing corporate authority. *See id.* at 74–75. Importantly, the Senate version of H.R. 7839 did not include the "of competent jurisdiction" proviso. *See id.* at 121.

The conference committee roundly rejected the Senate's approach and adopted the House's version of the Act. *See* Conf. Rep. No. 83–2271, at 25–35 (1954). The final version of the law included the Treasury-to-private capitalization path. *See* Housing Act of 1954, Pub.L. No. 83–560, § 201, 68 Stat. 590, 613–15. It also provided that once this capital conversion was complete, Fannie Mae's administrative parent would request that Congress turn Fannie Mae over entirely to its private owners. *See id.*, 68 Stat. at 615. It also included, as we know, the "of competent jurisdiction" proviso.[4] *See id.* at 620.

In sum, the non-jurisdictional reading of the 1954 sue-and-be-sued clause meshes comfortably with Congress' overall intention when enacting the Housing Act of 1954. Congress intended to put Fannie Mae on a path that

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4. The 1954 Act inserted an "of competent jurisdiction" proviso into the sue-and-be-sued clauses of two other entities—the Federal Savings and Loan Insurance Corporation and the Home Loan Bank Board (in the context of Board actions to enforce its regulations of savings and loan institutions). *See* Pub.L. No. 83–560, §§ 501(1), 503(2), 68 Stat. at 633, 635. Congress made the interpretive task concerning these two clauses easier, since it did not include a specific reference to federal courts. Neither of these sue-and-be-sued clauses confers automatic federal jurisdiction.

would eventually take the federal government out of the secondary mortgage market. As part of this process, Congress removed Fannie Mae's jurisdiction-granting sue-and-be-sued clause and elected the default option for federally chartered corporations—that they do not automatically gain access to the federal courts, unless the government owns more than half of the corporation's capital stock.[5] After Congress passed the 1954 Act, Fannie Mae would still have access to the federal courts purely on the basis of its federal charter until the Treasury disentangled itself from the corporation. At that point, the government would no longer own more than half of the corporation's capital stock, Fannie Mae's administrator would request that the company be completely turned over to its private owners, and Fannie Mae would be in the position of every other federally chartered corporation that does not receive the special treatment of a jurisdiction-conferring sueand-be-sued clause. *See* Paul E. Lund, *Federally Chartered Corporations and Federal Jurisdiction*, 36 Fla. St. U.L.Rev. 317, 334–35 (2009) (calling the number of corporations with automatic

5. As a consequence of the Supreme Court's decision in *Osborn*, "a suit by or against a corporation of the United States is a suit arising under the laws of the United States." *Pac. R.R. Removal Cases*, 115 U.S. 1, 11, 5 S.Ct. 1113, 29 L.Ed. 319 (1885) (citing *Osborn*, 22 U.S. (9 Wheat.) at 817–28). The district courts thus have jurisdiction over suits by or against federally chartered corporations under 28 U.S.C. § 1331, at least in theory. *See id.* at 14, 5 S.Ct. 1113; *see also Red Cross*, 505 U.S. at 251, 112 S.Ct. 2465. In 1925, Congress limited this ground of jurisdiction so that only corporations where the government owns more than half of the capital stock could benefit from it. *See* Act of Feb. 13, 1925, ch. 229, § 12, 43 Stat. 936, 941 (codified as amended at 28 U.S.C. § 1349).

access to federal courts through their sue-and-be-sued clauses "a select group" and a "handful").

Although Congress did not speak specifically to its intent in amending Fannie Mae's sue-and-be-sued clause, it did not have to. Congress' intent for the Housing Act of 1954—to place the government and Fannie Mae on paths that would ultimately diverge—was clear. The amendment to Fannie Mae's sue-and-be-sued clause was part and parcel of this overarching intendment.

B. The 1974 amendment

Congress returned to Fannie Mae's corporate charter in 1974 to once again amend the company's ability to gain access to the federal courts. This amendment did not touch on the sue-and-be-sued clause, but it affects our interpretation of that portion of Fannie Mae's charter. If a separate portion of Fannie Mae's charter explicitly speaks to jurisdiction, this militates against a jurisdictional reading of the sue-and-be-sued clause. *See Deveaux*, 9 U.S. (5 Cranch) at 86.

Prior to 1974, both Fannie Mae and its sister corporation, Ginnie Mae (formally titled the Government National Mortgage Corporation), were required to "maintain [their] principal office in the District of Columbia and shall be deemed, for purposes of venue in civil actions, to be a resident thereof." Housing and Urban Development Act of 1968, Pub.L. No. 90–448, § 802(c)(3), 82 Stat. 476, 536, 537. Then, in the Housing and Community Development Act of 1974, Congress amended this clause to provide

that Fannie Mae "shall be deemed, for purposes of *jurisdiction* and venue in civil actions, to be a District of Columbia corporation." Pub.L. No. 93–383, tit. VIII, § 806(b), 88 Stat. 633, 727 (codified at 12 U.S.C. § 1717(a)(2)(B)) (emphasis added). Congress did not make a parallel amendment to the corporate charter of Ginnie Mae, which had no capital stock and was "in the Department of Housing and Urban Development." 12 U.S.C. § 1717(a)(2)(A).

By adding the term "jurisdiction," Congress intended to allow Fannie Mae to access the federal courts via diversity jurisdiction pursuant to 28 U.S.C. § 1332. Section 1332 deems a corporation a citizen "of every State ... by which it has been incorporated and of the State ... where it has its principal place of business." 28 U.S.C. § 1332(c)(1). But federally chartered corporations are not "citizens" of any "State" for the purposes of section 1332. *See Wachovia Bank v. Schmidt*, 546 U.S. 303, 306, 126 S.Ct. 941, 163 L.Ed.2d 797 (2006); *Bankers' Trust Co. v. Tex. & P. Ry. Co.*, 241 U.S. 295, 309–10, 36 S.Ct. 569, 60 L.Ed. 1010 (1916); *Hancock Fin. Corp. v. Fed. Sav. & Loan Ins. Corp.*, 492 F.2d 1325, 1329 & n. 4 (9th Cir.1974). Recognizing this fact, Congress has filled the statutory gap on a few occasions by deeming specific corporations or classes of corporations to be citizens of the states in which they are located. *See* Act of Mar. 3, 1887, ch. 373, § 4, 24 Stat. 552, 554 (codified as amended at 28 U.S.C. § 1348) ("[A]ll national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them ... be deemed citizens of the States in which they are respectively located ...."); *see also* 7 U.S.C.

§ 941(c) ("The telephone bank ... shall, for the purposes of jurisdiction and venue, be deemed a citizen and resident of the District of Columbia."). The 1974 amendment to Fannie Mae's charter is another example of this type of statute.

Fannie Mae would have no use for diversity jurisdiction if it could enter the federal courts pursuant to its sue-and-be-sued clause. The latter basis of jurisdiction does not contain an amount-in-controversy requirement, a complete-diversity requirement, or a forum-defendant rule. It is also not limited by the well-pleaded complaint rule. *See Red Cross*, 505 U.S. at 258, 112 S.Ct. 2465. If Fannie Mae's sue-and-be-sued clause confers subject matter jurisdiction, then Congress amended the company's charter in 1974 for no reason whatsoever. *See Hancock*, 492 F.2d at 1328–29. The absence of any change to Ginnie Mae's charter confirms this interpretation of the Fannie Mae amendment. Ginnie Mae had no use for diversity jurisdiction whatsoever—it had plenary access to the federal courts as an agency of the federal government. *See* 28 U.S.C. §§ 1345, 1346.

The majority believes that the word "jurisdiction" in the 1974 amendment refers only to personal jurisdiction, not subject matter jurisdiction. A natural reading of the statute does not lead to this result. When Congress dubbed Fannie Mae "a District of Columbia corporation," it employed a phrase with a universally understood meaning. Just as "a Delaware corporation" is an entity incorporated under the laws of that state, *see, e.g.*, *Eldridge v. Richfield Oil Corp.*, 364 F.2d 909, 909 (9th Cir.1966), "a District of Columbia corporation" is one

that has been incorporated under the laws of the District. Section 1332 fills in the rest, making that District of Columbia corporation a District citizen, and therefore eligible for diversity jurisdiction. *See* 28 U.S.C. § 1332(c)(1), (e). Congress' designation of the District as the effective place of Fannie Mae's incorporation also makes Fannie Mae subject to general jurisdiction—that is, personal jurisdiction—in the District's courts. *See Daimler AG v. Bauman*, --- U.S. ----, 134 S.Ct. 746, 760, 187 L.Ed.2d 624 (2014). But the 1974 amendment cannot be cabined so that it legislates personal jurisdiction, and personal jurisdiction alone.

The plain language of the 1974 amendment shows that Congress intended to give Fannie Mae access to the federal courts by diversity jurisdiction. Since we cannot presume that Congress amends statutes with frivolous intent, it follows that Fannie Mae must have needed this jurisdictional hook. Congress' pronouncement confirms that Fannie Mae's sue-and-be-sued clause does not confer federal jurisdiction.

IV. Conclusion

The Supreme Court's cases interpreting sue-and-be-sued clauses, culminating with *Red Cross*, have defined the tool box we are to use in examining Fannie Mae's charter. All of the interpretive techniques point in a single direction—that the "of competent jurisdiction" proviso added to Fannie Mae's charter demands that the company come up with some point of entry to the federal courts other than its status as a federally chartered corporation. I respectfully dissent.

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, FILED OCTOBER 21, 2009

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 02-6568 CBM (AJWx)

CRYSTAL MONIQUE LIGHTFOOT, *et al.*,

Plaintiffs,

v.

CENDANT MORTGAGE CORPORATION
dba PHH MORTGAGE, *et al.*,

Defendants.

JUDGMENT

In accordance with Federal Rule of Civil Procedure 58 and consistent with the Court's "Order Granting Defendants Cendant Mortgage Corporation, Fannie Mae and Matthews' Motions to Dismiss; And Request for Judicial Notice" [Doc. No. 59], IT IS ORDERED AND ADJUDGED that judgment be entered in favor of Defendants Cendant Mortgage Corporation, Fannie Mae, and Robert O. Matthews.

IT IS SO ORDERED.

Appendix C

DATED: October 21, 2009

BY /s/
CONSUELO B. MARSHALL
UNITED STATES
DISTRICT JUDGE

APPENDIX D — CIVIL MINUTES OF THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, DATED SEPTEMBER 5, 2002

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 02-6568-RSWL

Date: September 5, 2002

Title: CRYSTAL MONIQUE LIGHTFOOT, *et al.* v. CENDANT MORTGAGE, *et al.*

PRESENT: THE HONORABLE RONALD S. W. LEW, U.S. DISTRICT JUDGE

Jovita P. Ilagan	Not Present
Courtroom Clerk	Court Reporter

ATTORNEYS FOR PLAINTIFFS:
Not Present

ATTORNEYS FOR DEFENDANTS:
Not Present

PROCEEDINGS: (In Chambers)

Appendix D

The Court has read and considered the plaintiffs' ex parte application to remand case back to Superior Court (the "application"), the opposition of Fannie Mae to the application and the plaintiffs' response to the defendant's opposition. The application is hereby denied.

IT IS SO ORDERED.

APPENDIX E — FANNIE MAE'S NOTICE OF REMOVAL TO THE UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA, FILED AUGUST 22, 2002

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 02-6568

CRYSTAL MONIQUE LIGHTFOOT, BEVERLY ANN HOLLIS-ARRINGTON,

Plaintiffs,

vs.

CENDANT MORTGAGE CORPORATION DBA PHH MORTGAGE, FANNIE MAE, ROBERT O. MATTHEWS: (A. MARRIED MAN), ATTORNEYS EQUITY NATIONAL CORPORATION,

Defendants.

NOTICE OF REMOVAL

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §§1441 and 1446, Fannie Mae, a congressionally chartered federal instrumentality of the United States, hereby removes the case of Lightfoot, et al. v. Cendant Mortgage Corporation, etc., et al., Case No. LC061596, pending in

the Superior Court of California, County of Los Angeles, Northwest Judicial District, to the United States District Court for the Central District of California; and in support thereof states as follows:

1. Fannie Mae is a defendant in the action styled Lightfoot, et al. v. Cendant Mortgage Corporation, etc., et al., Case No. LC061596, pending in the Superior Court of California, County of Los Angeles, Northwest Judicial District. Fannie Mae is a congressionally chartered federal corporation which was established to carry out vital public policies prescribed by statute including creating a secondary market for residential mortgage financing, stimulating the flow of private capital into housing, and improving the affordability of home ownership. *See* 12 U.S.C. §1716.

2. Fannie Mae was first served with the summons and complaint on July 24, 2002. A copy of the summons and complaint are attached hereto as Exhibit A

3. The time within which Fannie Mae is required by laws of the United States, 28 U.S.C. §1446(b), to file this notice of removal has not yet expired.

4. As set out in paragraph 6 below, this Court has subject matter jurisdiction over this action because Congress conferred party-based federal jurisdiction in Fannie Mae's federal charter.

5. Defendant, Cendant Mortgage Corporation, consents to removal, and joins in this Notice of Removal.

To the best of Fannie Mae's knowledge, the other defendants in the action have not been served and have not entered an appearance in the state court action.

Federal Jurisdiction Conferred by Fannie Mae's Charter

6. Federal subject matter jurisdiction exists in this action by virtue of 12 U.S.C. §1723a, a provision of the Fannie Mae Charter Act that grants Fannie Mae authority "to sue and be sued, and to complain and defend, in any court of competent jurisdiction, State or Federal." *See American National Red Cross v. S.G. & A.E.*, 505 U.S. 247, 248 (1992) (holding "sue and be sued" provision in charter act of 505 U.S. 247, 248 (1992) (holding "sue and be sued" provision in charter act of federally chartered corporation that expressly mentions federal courts to confer original federal jurisdiction over all cases to which the federally chartered corporation is a party with the consequence that the organization is hereby authorized the removal from state to federal court of any state-law action it is defending.").

7. Fannie Mae reserves the right to submit evidence supporting this Notice of Removal should Plaintiffs move to remand.

8. By virtue of this removal petition, Fannie Mae does not waive its right to assert any claims or other motions, including Rule 12 motions permitted by the Federal Rules of Civil Procedure.

9. Fannie Mae desires to remove this action to this Court and submits this Notice of Removal in accordance with 28 U.S.C. §1446(a) along with the exhibits hereto.

10. This Notice of Removal is being filed within thirty (30) days after receipt by Fannie Mae, by service or otherwise, of a copy of the initial pleading setting forth the claims for relief in this action and is, therefore, timely filed pursuant to 28 U.S.C. §1446(b).

11. Pursuant to 28 U.S.C. §1446(d), Fannie Mae shall give written notice of the filing of this notice of removal to all adverse parties and a copy of this notice is also being filed with the Clerk of the State Court in which this case was originally filed.

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12. Fannie Mae accordingly prays that this Court take jurisdiction of this action to its conclusion and to final judgment to the exclusion of any further proceedings in the State court in accordance with law.

Appendix E

DATED: August 20, 2002

Respectfully submitted,

SEVERSON & WERSON
A Professional Corporation

By: s/_____
Suzanne M. Hankins

Attorneys for Defendant
FANNIE MAE

APPENDIX F — 12 U.S.C.A. § 1717

§ 1717. Federal National Mortgage Association and Government National Mortgage Association

(a) Creation; succession; principal and other offices

(1) There is created a body corporate to be known as the "Federal National Mortgage Association", which shall be in the Department of Housing and Urban Development. The Association shall have succession until dissolved by Act of Congress. It shall maintain its principal office in the District of Columbia and shall be deemed, for purposes of venue in civil actions, to be a resident thereof. Agencies or offices may be established by the Association in such other place or places as it may deem necessary or appropriate in the conduct of its business.

(2) On September 1, 1968, the body corporate described in the foregoing paragraph shall cease to exist in that form and is hereby partitioned into two separate and distinct bodies corporate, each of which shall have continuity and corporate succession as a separated portion of the previously existing body corporate, as follows:

(A) One of such separated portions shall be a body corporate without capital stock to be known as Government National Mortgage Association (hereinafter referred to as the "Association"), which shall be in the Department of Housing and Urban Development and which shall retain the assets and liabilities acquired and incurred under sections 1720 and 1721 of this title prior to such date, including any and all liabilities incurred pursuant to subsection (c)

of this section. The Association shall have succession until dissolved by Act of Congress. It shall maintain its principal office in the District of Columbia and shall be deemed, for purposes of venue in civil actions, to be a resident thereof. Agencies or offices may be established by the Association in such other place or places as it may deem necessary or appropriate in the conduct of its business.

(B) The other such separated portion shall be a body corporate to be known as Federal National Mortgage Association (hereinafter referred to as the "corporation"), which shall retain the assets and liabilities acquired and incurred under sections 1718 and 1719 of this title prior to such date. The corporation shall have succession until dissolved by Act of Congress. It shall maintain its principal office in the District of Columbia or the metropolitan area thereof and shall be deemed, for purposes of jurisdiction and venue in civil actions, to be a District of Columbia corporation.

(3) The partition transaction effected pursuant to the foregoing paragraph constitutes a reorganization within the meaning of section 368(a)(1)(E) of Title 26; and for the purposes of such Title 26, no gain or loss is recognized by the previously existing body corporate by reason of the partition, and the basis and holding period of the assets of the corporation immediately following such partition are the same as the basis and holding period of such assets immediately prior to such partition.

APPENDIX G — 12 U.S.C.A. § 1723a

§ 1723a. General powers of Government National Mortgage Association and Federal National Mortgage Association

Effective: July 30, 2008

(a) Seal, and other matters incident to operation

Each of the bodies corporate named in section 1717(a)(2) of this title shall have power to adopt, alter, and use a corporate seal, which shall be judicially noticed; to enter into and perform contracts, leases, cooperative agreements, or other transactions, on such terms as it may deem appropriate, with any agency or instrumentality of the United States, or with any State, Territory, or possession, or the Commonwealth of Puerto Rico, or with any political subdivision thereof, or with any person, firm, association, or corporation; to execute, in accordance with its bylaws, all instruments necessary or appropriate in the exercise of any of its powers; in its corporate name, to sue and to be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal, but no attachment, injunction, or other similar process, mesne or final, shall be issued against the property of the Association or against the Association with respect to its property; to conduct its business without regard to any qualification or similar statute in any State of the United States, including the District of Columbia, the Commonwealth of Puerto Rico, and the Territories and possessions of the United States; to lease, purchase, or acquire any property, real, personal, or mixed, or any interest therein, to hold, rent, maintain, modernize,

renovate, improve, use, and operate such property, and to sell, for cash or credit, lease, or otherwise dispose of the same, at such time and in such manner as and to the extent that it may deem necessary or appropriate; to prescribe, repeal, and amend or modify, rules, regulations, or requirements governing the manner in which its general business may be conducted; to accept gifts or donations of services, or of property, real, personal, or mixed, tangible, or intangible, in aid of any of its purposes; and to do all things as are necessary or incidental to the proper management of its affairs and the proper conduct of its business.